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313 - 21709

VOL-202

ROBERT S. ILES et al.,
Plaintiffs,

vs. Bill.

JULIUS HEIDENREICH et al.,
Defendants.

MICHAEL ZIMMER, Sheriff, etc.,
Appellee,

vs.

ROBERT S. ILES et al., on
appeal of Ida M. Heidenreich,
Appellant.

202 I.A. 1

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Iles and Martin were complainants in a creditor's bill to reach in satisfaction of a judgment against their debtor, Julius Heidenreich, moneys that had been deposited with Zimmer, the Sheriff of Cook County, to redeem a certificate of sale of land which had been issued to said Heidenreich and assigned to his daughter Ida, appellant herein.

The bill sought to set aside the assignment as fraudulent. Zimmer, appellee, filed a cross-bill of interpleader containing the usual allegations of such a bill and averring that he held $3000 of such redemption money, that he did not know to whom to pay it, that appellant claimed it by virtue of said certificate and that appellees claimed such certificate was held by her subject to the lien of their said judgment.

Iles and Martin filed an answer to the cross-bill

213 - 31469

ROBERT S. ISAM et al.,
Plaintiffs,

vs. No. 213.

THELMA BOLTENHOUSE et al.,
Defendants.

NICHOLAS ZOGBY, Sheriff, etc.,
Appellee,

vs.

ROBERT S. ISAM et al., on
appeal of Isa S. Baldwin,
Appellant.

ALFRED BROWN
Attorney Ennis,
Chas. Gregory.

admitting its allegations and repeating their claim to such lien, and the Heidenreichs demurred to the bill. Later Zimmer filed an amended and supplemental cross-bill, as to which the said pleadings to the cross-bill were permitted to stand, and the demurrer and additional demurrers thereto were overruled. Julius stood by his demurrers and Ida answered.

The issues on the cross-bill were referred to a master to find conclusions of law and fact. His report was made, exceptions thereto were sustained, and a separate decree from that entered on the bill, which was taken as confessed, after the Heidenreichs had stood by their several overruled pleas and demurrers thereto, was entered ordering the deposit of such money with the clerk of the court, discharging the cross-complainant from all liability to the Heidenreichs, and enjoining Ida, according to the prayer of the amended and supplemental cross-bill, from prosecuting an action in tort against Zimmer for refusing to pay such moneys to her on demand therefor, which suit was then pending, as alleged in said amended and supplemental cross-bill, and also enjoining her from making any claims or demands "for any money or other property, right or thing issuing or growing out of the subject matter of said cross-bill." From that decree this appeal was taken.

Appellant urges that the cross-bill should have been dismissed for want of equity, claiming the evidence was insufficient to support the decree; in short, that the evidence fails to show the existence of the several elements necessary to sustain the equitable remedy of interpleader.

(1) It is urged that the same thing, debt or duty was not claimed by appellant and complainants to the bill.

Cases are cited distinguishing between a lien and the thing to which it may attach that are not applicable to the facts in this record. Here, as in Platte Valley Bank v. National Live Stock Bank et al., 155 Ill. 250, it is not the identical money deposited that is the subject of contention but the credit arising from the deposit. Both parties are claiming the same credit or chose in action, and it matters not though the claim of one is actionable at law and the other in equity. (Newhall v. Kastens et al., 70 id. 156.)

The point is made that because the cross-bill sets up that appellant had brought an action of tort as aforesaid against appellee Zimmer her claim against appellee is for damages for conversion. But in her answer she claims the specific fund by virtue of such assignment and takes issue on the sheriff's right to withhold it and to the remedy of interpleader. Nor does it appear either in the pleadings or the evidence that there was any actual conversion by the sheriff. It was pleaded and proven that there was a demand for the money and a refusal, but that at the time thereof appellee was defendant in a garnishment proceeding to reach the fund, and later up to the commencement of these proceedings was under order of court to hold and retain such funds until further order of the court.

(2) It is further urged that the claims of cross-defendants are not dependent on or derived from a common source. The claims of both emanate from the certificate sale, to which one claimed the legal and the other an equitable right. In other words, if it were fraudulently assigned, the legal claim to the redemption money would fail, and the equitable claim thereto prevail. While the facts are different from those in the Platte Valley Bank

Bank case, supra, and those of Byers v. Sanson-Thayer Comm. Co., 111 Ill. App. 575, the reasoning therein as to the common source is applicable here.

(3) The contentions that the sheriff had any interest or claim in the fund , or had in any way incurred an independent liability to either of the cross-defendants, have no basis in the evidence in our opinion, and we shall not take up space in discussing them.

We think therefore that the facts presented a proper case for interpleader, that the order to pay over the fund to the clerk and discharging the sheriff from any liability in the proceeding was proper. But we do not think the restraining order so far as it restrained prosecution of the suit in tort was proper in this kind of a proceeding. The only relief properly sought by a bill of interpleader is that which effectually discharges the petitioner from any further liability or annoyance with respect to the fund or property to which the adverse claims are made, and it may, and often does, include an injunctive relief against the prosecution of any other proceeding against the petitioner to establish title or ownership thereto. But it is aside from its purpose to litigate any other claim than that of a right to the property. Whether Ida Heidenreich was entitled to prosecute her suit in tort presented another distinct question. That suit was not to recover the fund but damages for withholding it. The decree in that respect must be modified, and will be reversed with directions to limit the restraining order in accordance with the views herein expressed, and to require the cross-defendants to interplead.

There was no order to interplead. There had already been entered a decree on the original bill as con-

fessed setting aside the assignment as fraudulent and void and directing the sheriff to pay complainants a portion of such redemption money and the remainder to Ida Heidenreich. That decree, however, has been reversed, (see opinion in case 21708 between the same parties) and the right to such fund has not yet been adjudicated. Regardless of what issues may yet be formed on the bill, the decree on the cross-bill as modified should include an order to interplead.

REVERSED WITH INSTRUCTIONS TO MODIFY DECREE.

131 - 22554

ROBERT S. ILES and ROBERT D. MARTIN,
Defendants in Error,

vs. Bill.

JULIUS HEIDENREICH, IDA M. HEIDENREICH and MICHAEL ZIMMER, Sheriff, etc.,

JULIUS HEIDENREICH,
Plaintiff in Error.

MICHAEL ZIMMER, Sheriff, etc.,
Defendant in Error,

vs. Cross-Bill.

ROBERT S. ILES, ROBERT D. MARTIN, JULIUS HEIDENREICH and IDA M. HEIDENREICH,

JULIUS HEIDENREICH,
Plaintiff in Error.

202 I.A. 4

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with Nos. 21708 and 21709, which were appeals by Ida Heidenreich from a decree on an amended creditor's bill and a separate decree on a cross and supplemental bill of interpleader, respectively, in which opinions have been filed. The questions presented in the three cases arise upon the same record and have practically the same titles.

This writ of error presents for review the overruling of plaintiff in error's pleas to the creditor's bill, and the overruling of his demurrers to the cross-bill, by all of which he elected to stand. The same point

Plaintiff in error.

vs. Civil.

Defendants in error.

Plaintiff in error.

vs. Crim-Dft.

Defendant in error.

Plaintiff in error.

vs. Civil.

Defendant in error.

Plaintiff in error.

vs. Crim-Dft.

Defendant in error.

raised on his pleas, namely, as to the jurisdiction of the Municipal Court to render the judgment on which the creditor's bill was based, was fully considered in our opinion filed Nov. 14, 1916, in case 21708, where we held the same plea by Ida Heidenreich was properly overruled, but that the decree on the bill should be reversed because of insufficient allegations in the bill to support the decree. On the same points the same conclusion follows as to Julius Heidenreich, and we need only to refer to that opinion for a statement of our reasons.

We also upheld, in the appeal of Ida (see opinion in case No. 21709, filed Nov. 14, 1916) the decree on the said cross-bill so far as it ordered cross-complainant to file the fund in dispute with the clerk of the court and discharged him from further liability thereon in that proceeding, but reversed the decree for modification so far as it enjoined Ida from prosecuting an independent suit in tort and so far as it failed to order an interpleader. It is only with respect to the failure to order an interpleader that said decree is erroneous as to Julius Heidenreich. Nevertheless as new steps to adjudicate the right to the fund in dispute may still be taken as to which he may have a right to be heard, either in a further hearing on the bill if amended or by interpleading under a modified order, both decrees must be reversed as to him.

It is anomalous that both decrees should be considered under one writ. The point not having been raised we shall not consider it, but treat the decrees as one made in the same cause. We accordingly reverse both decrees with the same order and directions entered in the appeal cases.

REVERSED AND REMANDED.

325 - 21721

MID-CITY TRUST & SAVINGS BANK, a corporation,
Defendant in Error,

vs.

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 6

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error as surety gave a bond to defendant in error agreeing to make good to the latter any loss which it as employer might sustain "by reason of any act of * * * forgery," on the part of any employe covered by its terms subject to certain conditions not necessary to state, but provided that the surety's liability would terminate as to subsequent acts of "any employe leaving the services of the employer." It was stipulated that while the bond was in force as to one of defendant in error's employes he made four checks, proved by a witness to be forgeries, two of which aggregating $115, were presented to the employer bank and paid during said employe's period of employment, and two of which, aggregating $800, were dated, presented to, and paid by the employer after such period. Introduction in evidence of the last two checks was objected to on the ground that they bore date after the period of employment and were incompetent under the bond, and the contention made here is that even though they were forgeries, they may not have been uttered or put in circulation during the period of employment, the burden of proving which devolved upon plaintiff below, and that without such proof there was no

SOSIA. 6 !

proof of liability on the bond as to such two checks.

It having been stipulated that all the checks were made during said employment their date was immaterial. As they were false writings, apparently capable of defrauding and manifestly made with intent to defraud, they constituted forgeries (Goodman v. People, 228 Ill. 154) to which the act of uttering is not necessary. Hence the forgeries were committed during such employment and plaintiff's loss ensued by reason thereof. The bond covers loss sustained by reason of any act of forgery by the employe while so employed. We think the checks were admissible in view of the stipulation and the undenied evidence of forgery, and that the evidence with the stipulation was sufficient to support the judgment. No propositions of law were raised otherwise than by the ruling on such evidence. Hence the judgment will be affirmed.

AFFIRMED.

338 - 21735

JOHANNA RAU LONGHI, Appellee,

vs.

EMILIO LONGHI, Appellant.

Appeal from
~~ERROR TO~~
CIRCUIT COURT
OF COOK COUNTY.

202 I.A. 98-1

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order adjudging appellant to be guilty of contempt for wilfully failing and refusing to pay temporary alimony as ordered, pending an appeal from a final decree for separate maintenance and alimony, on the ground that an affirmance here of such decree rendered such order for temporary alimony inoperative thereafter.

It appears that this court ordered a stay of mandate on the order of affirmance for the time a petition for certiorari was pending before the Supreme Court, and that the default to pay temporary alimony was after such affirmance and while such mandate was in force.

Appellant's point is that after the order of affirmance there was no appeal pending and hence the order for temporary alimony became ineffective.

The statute on which the order for temporary alimony was based empowers the trial court to grant and enforce equitable alimony "during the pendency of appeal or writ of error." (Hurd's R. S. 1916, Sec. 15, Ch. 40) Its manifest purpose is to enable a dependent wife to have support until, in case of a final decree in her favor, she may have the benefit of such decree, which she does not have on its affirmance while a stay of mandate is in force. Until the mandate issues the appeal is still pending within the intent

and meaning of said statute.

Nor do we think the refusal to pay alimony under the order therefor was any the less wilful because appellant questioned its legal effect and hence that the evidence did not warrant the finding that such refusal was wilful.

The order is affirmed.

AFFIRMED.

and pending or said statute.

Nor is he think the record to pay attorney under the order Director was by the Zone will because appellant quantities and its legal effect and there that the evidence did not warrant the finding that such refusal was wilful.

The order is affirmed.

347 - 21744

HARMAN COMPANY, a corporation,
Appellant,

vs.

E. H. KASTOR and AARON BODENWEISER,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 9

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal raises the question whether plaintiff's statement of claim presented a cause of action against defendants (appellees) as guarantors of the payment of certain notes of the U. S. Kellastone Co. payable to appellant's order.

The statement was in the form of a common law declaration against appellees as guarantors under a written instrument executed by said Kellastone Co., by appellant and by appellees, which is set out in the statement in haec verba. The question is does such instrument constitute a contract of guaranty on the part of appellees?

In grammatical construction the instrument consists merely of a preamble and a recital of its execution. The preamble contains a series of recitals each beginning with "whereas", stating respectively (1) that the U. S. Kellastone Co. is indebted to the Harman Co., (2) that it is unable to pay its indebtedness in cash (3) that it has tendered in payment thereof notes for certain amounts to appellant's order, described as to amounts and dates (4) that appellant will not accept said notes "unless they bear endorsement or guarantee" and (5) that the Kellastone Co.

and appellant have mutually agreed as set forth in the last of such recitals. Then follows the recital of the execution of the instrument. There is no operative clause in the instrument unless the last recital may be so regarded. It reads:

> "And whereas, the said U. S. Kellastone Company and the said Harman Company have mutually agreed and evidenced said agreement in this instrument, to-wit: as follows:
>
> That any and all of the aforesaid payments, with accrued interest, may be made at any time prior to the dates of maturity thereof, at the option of the payor; provided, that on default of making any of the aforesaid payments at maturity thereof, the whole of the unpaid installments and accrued interest shall thereby become and be immediately due and payable at the option of the payee, without notice, and provided further that in the event of this note, or any portion thereof, be collected by an attorney or by suit or litigation, the undersigned promises and agrees to pay to the holder thereof, a reasonable sum in addition to said principal and interest, as attorney's fees."

In the witness clause that immediately follows it is recited that the corporations have caused the instrument to be signed, etc. and that "the said guarantors have signed, sealed etc." Then follows the signatures of the several parties with the word "guarantor" following the signatures of appellees.

It is manifest that the contract was crudely drawn, and it may be that it fails to express the real intention of the parties. If it was merely ambiguous resort might be had to extrinsic evidence and surrounding circumstances to ascertain its intent. But if there is omitted therefrom provisions essential to a liability on the part of the persons sought to be charged, then the omitted provisions cannot be supplied by evidence merely competent to show the meaning of the ambiguous language employed. The court cannot make a new contract for the

and defendant have mutually agreed to set forth in the last of such recitals. Then follows the recital of the execution of the instrument. There is no requisite clause in the instrument unless the last recital may be so regarded. It reads:

"All whereas, the said D. C. Williamson
Company and the said Elleen Theobury have mutually
agreed and stipulated and covenanted in this
instrument, to-wit: as follows:

That any and all of the aforesaid grants,
with accrued interest, may be made at any time
prior to the date of maturity thereof, at the
option of the payor; provided, that no default
of making any of the aforesaid payments at
maturity thereof, the whole of the unpaid install-
ments and accrued interest shall thereupon become and
be immediately due and payable at the option of the
payee, without notice, any provision to the contrary
in the terms of this note, or any provision thereof,
to the contrary notwithstanding, and the payee may
take undisturbed possession and access to pay be the
holder thereof, a reasonable sum in addition to said
principal and interest, as attorney's fees."

In the witness clause that immediately follows it is recited that the corporations have caused the instrument to be signed, etc. and that "the said Covenantors have signed, sealed etc." Then follow the signatures of the several parties with the word "Grantor" following the signatures of appellees.

It is manifest that the contract was crudely drawn, and it may be that it fails to express the real intention of the parties. If it was merely ambiguous resort might be had to extrinsic evidence and surrounding circumstances to ascertain its intent. But if there is omitted therefrom provisions essential to a liability on the part of the persons sought to be charged, then the omitted provisions cannot be supplied by evidence merely competent to show the meaning of the ambiguous language employed. The court cannot make a new contract for the

parties, and cannot presume they intended to insert in their written contract a provision "other or different from that which the plain language used would indicate, and then give a construction to the contract which would be legitimate if the contract contained the supposed omitted provision." (Fitzgerald v. Staples et al., 88 Ill. 234.)

Looking at the contract in question from this point of view and assuming for sake of argument that the word "undersigned" refers to appellees alone, still we find no language that imports a promise on their part to pay said notes (for the payment of which alone the suit is brought). Read in the most favorable light to the creditor when all its recitals are considered the contract appears to be one in which the real parties thereto, namely, appellant, the creditor, and the U. S. Kellastone Company, the debtor, agreed to, or at least sought the adjustment of the indebtedness by the giving and taking of the latter's notes therefor, if they were guaranteed; and provided (1) that they might be paid before their maturity and in case of default in payment of any one all might be declared due by the holder thereof, and provided (2) in the event of their collection through an attorney or by suit, the expense of attorney's fees should also be paid. Appellees appear to have assented to this arrangement by signing such contract, but did not thereby guarantee payment of the notes or even the attorney's fees. That required either their endorsement or an express contract of guaranty. This instrument contains no language that can properly be construed as such. Manifestly it cannot be enlarged by implication. The clear import of the language employed is that the instrument evidences that said creditor agrees to accept the debtor's

notes described in the recitals with certain modifications as to when they may be paid or enforced, provided the "undersigned" (assumed to be appellees) will do something in the future, namely, pay attorney's fees incurred in the collection of the notes and (giving a most liberal construction) in addition the notes also.

We need not discuss the ambiguity of this last proviso, as to what is meant by "collected" or who is referred to by the "undersigned", whether all the signers, making a joint liability if any is imposed, or only appellees. If it plainly read "provided appellees promise to pay the notes if the maker does not," the mere signing of such instrument by appellees would not constitute a promise to that effect. It would still remain merely an agreement between the creditor and debtor as to the terms on which the notes would be accepted, and an assent of appellees to the agreement between them, but would not constitute an agreemant on their part to pay or even to endorse the notes. As the instrument reads it is a mere executory contract between the only two parties named therein that purport to have "mutually agreed" namely, appellant and the Kellastone Co. As an alleged contract of guaranty it lacks any provision containing either an express or implied agreement on the part of appellees to pay anything absolutely or conditionally.

It is a settled rule of law that the undertaking of a guarantor is to be construed strictly "and that he is bound to the extent and in the manner and under the circumstances pointed out in his obligation, and no farther," and that his liability is not to be extended by implication. (Tolman &c. v. Rice, 164 Ill. 255.) Here we have to imply an agreement not expressed to support the theory of an

absolute guaranty; and even if the language imports a conditional one, there is no allegation in the pleading of the performance of such condition.

But as appellees are not named in the contract we think the language of the court in Lancaster et al. v. Roberts et al., 144 id. 213, is applicable. It was there said:

> "Where a third person merely annexes his name to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature in such a case can only be regarded as an expression of his assent to the act of the parties in making the contract." (p. 222-3)

Hence we think the statement of claim was properly stricken as failing to disclose a cause of action against appellees.

AFFIRMED.

applicable precedent; and even if the Insurance Agents's
contribution was, under it no alleviation in the plaintiff's
of the particularity of such condition.

Nor is Appellees' cite not issued to the contract
we follow the language of the recent In Insurance Co. v.
Insurance Co., 141 Va. 818, is applicable. It was there
held:

> "Where a life insurance policy contains the
> same in a prominent clause on the body of it that
> certain acts, and which is in itself a condition
> precedent between which avoids it and are
> mentioned in it, that the policy does not become
> binding until the delivery and operative until
> of the contract. The statute in such a case
> only if required in an application of his assent
> to the acts of the parties in making the contract."
> Ib. 822-3)

Hence we think the statement of claim was properly
striking to disclose a cause of action against
appellees.

AFFIRMED.

400 - 22355

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. MAUDE RAMLER, Appellee,

vs.

OSCAR STROMBERG, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 11

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question raised and argued herein is whether there was sufficient evidence to support the court's finding that appellant was the father of the bastard child for whose support the proceeding was brought.

We recognize that the evidence is full of the contradictions usual in this kind of a case, thus calling for application of the tests of credibility.

The mother is a young woman of meagre education, and evidently does not understand the English language well, which may well account for her contradictory answers to some questions, although the questions themselves were not always clear. The record suggests this explanation of such contradictions rather than a purpose on her part to deliberately falsify. Her testimony in the main has the ring of probability.

Testifying against her were the defendant and his personal friends and relatives, whose interest as such was presumably considered by the court. Of their credibility and hers the trial judge was in a better position than we to form an opinion. The testimony of defendant's

witnesses related mostly to circumstances tending to establish an alibi. While they outnumbered the witnesses for the People, still the weight of the evidence does not depend on the number of witnesses alone. Notwithstanding their evidence the mother's circumstantial account of her relations with the defendant carries greater conviction to our minds than the summary and categorical denial of the circumstances by the defendant, or the testimony of his friends and relatives tending to refute her testimony. The record discloses no particular advantage to this young mother, or controlling motive on her part, in imputing the paternity of her child to one in the circumstances of defendant if he was not its father. There was no claim, nor evidence to support an inference that she was a lewd woman or consorted with other men. We think there was sufficient evidence to show that they were together in one another's company and held illicit relations not only for some months before conception but within a period not unusual for gestation, which according to the testimony was from the "last" of June to the following May 8th, little over one week beyond nine months.

The fact that she menstruated several times after June is not necessarily controlling.

After a careful analysis of the evidence, which need not be set out in detail, we are of the opinion that its weight depended so much on the superior facilities of the trial court for determining the credibility of the witnesses in seeing and hearing them and observing their manner of testifying, that we cannot say the court's finding was manifestly against the weight of the evidence.

The judgment will be affirmed.

AFFIRMED.

400 - 32355

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. MAUDE RAMLER, Appellee,

vs.

OSCAR STROMBERG, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

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witnesses related mostly to circumstances tending to establish an alibi. While they outnumbered the witnesses for the People, still the weight of the evidence does not depend on the number of witnesses alone. Notwithstanding their evidence the mother's circumstantial account of her relations with the defendant carries greater conviction to our minds than the summary and categorical denial of the circumstances by the defendant, or the testimony of his friends and relatives tending to refute her testimony. The record discloses no particular advantage to this young mother, or controlling motive on her part, in imputing the paternity of her child to one in the circumstances of defendant if he was not its father. There was no claim, nor evidence to support an inference that she was a lewd woman or consorted with other men. We think there was sufficient evidence to show that they were together in one another's company and held illicit relations not only for some months before conception but within a period not unusual for gestation, which according to the testimony was from the "last" of June to the following May 8th, little over one week beyond nine months.

The fact that she menstruated several times after June is not necessarily controlling.

After a careful analysis of the evidence, which need not be set out in detail, we are of the opinion that its weight depended so much on the superior facilities of the trial court for determining the credibility of the witnesses in seeing and hearing them and observing their manner of testifying, that we cannot say the court's finding was manifestly against the weight of the evidence.

The judgment will be affirmed.

AFFIRMED

22669

GEORGE M. BURR, JOHN L. STODDARD, and J. W. WATZEK, as a committee and trustees, etc.,
Appellees,

vs.

GEORGE K. WENTWORTH, et al., on appeal of THE FORT DEARBORN NATIONAL BANK,
Appellants.(?)

INTERLOCUTORY.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

202/A/3

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Fort Dearborn National Bank, one of the defendants to a bill in chancery, which combines the features of a creditor's bill and one in aid of execution, from an interlocutory order appointing without notice a receiver of the property of the judgment creditor, George K. Wentworth, Sr. The order is based on the verified bill and an affidavit setting forth why the application is made without notice, and upon filing of a bond required by the statute for the appointment of a receiver without notice, and appoints a receiver of all the estate, property, real and personal, etc. of the said Wentworth. It appears that all of the defendants, including said Wentworth and his son, hereafter referred to, except appellant and three others not concerned with this appeal, are non-residents of this state.

In connection with averments usual to such a bill it charges in general terms an unlawful conspiracy between said principal defendant Wentworth and others to defraud

complainants and other creditors, and that in pursuance thereof hehhad made pretended and colorable sales and transfers of his property and assets.

The material averments relating to appellant affecting the question before us, are in substance that it was a party to a pretended, colorable and fraudulent sale to the son of said Wentworth, of property belonging to the latter that was rightfully subject to the payment of complainants' judgment and his other debts; that such sale was under a supposed power of sale contained in a collateral note of said Wentworth made to appellant; that a part of the property so colorably and wrongfully transferred and conveyed consisted of 500 or more shares of capital stock of a foreign corporation and other property real and personal not specifically known, (of which a discovery is sought); and that appellant claims some right or interest in said property and assets "under some pretended claim, obligation or debt of George K. Wentworth, Jr." (the son aforesaid) and that the claim is pursuant to said unlawful conspiracy.

The bill does not purport to specify any particular property that has come into appellant's possession except said 500 or more shares of stock, and avers in effect that it and the other undiscovered property so colorably etc. transferred or conveyed to Wentworth, Jr. is held by him and therefore is not in appellant's possession, and that it now merely has an indefinite claim thereto by virtue of some obligation of the latter. In another general averment the bill charges on information and belief that "other" assets, with respect to which complainant claims the right to discovery, are held either in the name of the principal defendant or in the names of the other numerous defendants including

appellant.

While under the ruling in English v. The People, 90 Ill. App. 54, such an averment of interest in appellant is sufficient to give it standing to question this order, we fail to see that its interest is prejudiced thereby. The inferences from the bill are that it is not in possession of any property covered by the order, unless it be some that is alleged to be unknown to orators, and with respect to which a discovery is sought and appellant asked to make answer. Manifestly the receiver can not take possession of property now unknown and to be discovered, even if appellant claims some interest therein or holds it in its name. And if there is any such property the order does not affect any title appellant may have therein. (Vandalia v. R. R. Co., 209 Ill. 73.) And if it had any valid lien thereon at the time of the appointment the receiver's possession, if taken, will be subject thereto and will not divest it if acquired in good faith. (Chi. Tit. & Tr. Co. v. Smith, 158 id. 417.) Should the receiver take possession of any property belonging to appellant or to which it has a superior claim it is not without remedy but may apply to the court appointing the receiver for its restoration. (High on Receivers (4th Ed.) Sec. 143).

Inasmuch therefore as it affirmatively appears by the bill that appellant does not hold possession or title to any known property alleged to belong to the principal defendant, and that the receiver cannot acquire possession of the property in which appellant is merely alleged to claim some indefinite interest until a discovery thereof can be had, in the proceedings for which appellant will have a right to be heard, it is not apparent how appellant, even if entitled to notice of the application for the

appointment of the receiver, can be prejudiced thereby.

Whether the order may not be too sweeping, so far as it affects the rights of the principal defendant is a question which we do not think appellant is entitled to raise. Its appeal simply raises questions affecting its rights, and as to them the points raised are, in view of the alleged circumstances of no disturbance of its possessory rights, more or less academic.

AFFIRMED.

316 - 21712

MICHAEL ZIMMER, Sheriff of Cook County, Illinois, for the use of Sterling B. Cramer and C. A. Mullen,
Defendant in Error,

vs.

JOHN P. CUMMINGS, Trustee, and JOSEPH T. DELFOSSE,

JOSEPH T. DELFOSSE,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 18

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error recovered judgment against plaintiff in error in an action of debt, as surety on a bond given in a certain replevin action brought by John P. Cummings, one of the defendants below, as trustee, against Anton J. Cermak, bailiff of the Municipal Court of Chicago, for the possession of a certain automobile. Said Cermak held said automobile under and by virtue of an execution and levy made thereon as the individual property of the said Cummings, to satisfy a judgment against him. The court found the issues for the plaintiff in the action on the replevin bond, and entered judgment thereon.

On the trial below, defendant Delfosse alleged, by way of defense, - and it was admitted by the plaintiff - that the replevin action brought by the said John P. Cummings was not determined upon the merits; and sought to show by his own testimony that he (Delfosse) was the owner of said automobile, and that the said John P. Cummings had possession thereof merely as bailee or trustee. This

Defendant in error recovered judgment against
plaintiff in error in an action of debt, as surety on a
bond given in a certain replevin action brought by John
F. Cummings, one of the defendants below, as trustee,
against Anton J. Carmen, Sheriff of the Municipal Court
of Chicago, for the possession of a certain automobile.
Said Carmen held said automobile under and by virtue of an
execution and levy made thereon as the individual property
of the said Cummings, to satisfy a judgment against him.
The court found the issues for the plaintiff in the action
on the replevin bond, and entered judgment thereon.

On the trial below, defendant defense alleged,
by way of defense, - and it was admitted by the plaintiff -
that the replevin action brought by the said John F.
Cummings was not determined upon the merits; and sought to
show by his own testimony that he (Wallace) was the owner
of said automobile, and that the said John F. Cummings
had possession thereof merely as bailee or trustee. This

testimony, however, was stricken from the record on motion of plaintiff. To further substantiate his claim, defendant Delfosse offered in evidence the following document:

"Chicago, May 14, 1913.

"Received of Joseph T. Delfosse one Premier automobile, model 45, serial No. 2004, six cylinder, in trust, to be returned on or before ninety days after date.

(signed) JOHN P. CUMMINGS,"

to the admission of which plaintiff interposed an objection, which objection was sustained by the court. The action of the court in excluding this evidence is assigned as error.

Sec. 26 of the Replevin act, ch. 120, R. S. of Ill., provides that, "When the merits of the case have not been determined in the trial of the action in which the bond was given, the defendant in the action upon the replevin bond may plead that fact and his title to the property in dispute, in said action of replevin." Under this provision of our statute, defendant Delfosse had the undoubted right to show that he (Delfosse) had title to the property in dispute; and in this connection, it was essential that he be permitted to show by competent evidence, that the said John P. Cummings, as bailee or trustee, was entitled to the possession of the said automobile. (Magerstadt v. Harder, 199 Ill. 271.) The court therefore committed reversible error in denying the defendant Delfosse the right to show that the said Cummings was entitled to the possession of said property as bailee for defendant Delfosse. In this view of the case, the other points raised by defendant Delfosse need not be discussed.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

testimony, however, was stricken from the record on motion of plaintiff. To further substantiate his claim, defendant Dellasse offered in evidence the following document:

"Chicago, May 14, 1919.

"Received of Joseph T. Dellasse one Premier automobile, model 49, serial No. 3004, six cylinder, in trade, to be returned on or before ninety days after date.

(signed) JOHN P. CUMMINGS."

to the admission of which plaintiff interposed an objection, which objection was sustained by the court. The action of the court in excluding this evidence is assigned as error.

Sec. 56 of the Replevin act, ch. 120, R. S. of Ill., provides that, "When the merits of the case have not been determined in the trial of the action in which the bond was given, the statement in the action upon the replevin bond may allege that said title to the property in dispute, in said action of replevin." Under this provision of our statute, defendant Dellasse had the undoubted right to show that he (Dellasse) had title to the property in dispute; but in this connection, it was essential that he be governed to show by competent evidence, that the said John T. Cummings, as bailee or trustee, was entitled to the possession of the said automobile. (Baerenstedt v. Barden, 149 Ill. 61.) The court therefore committed reversible error in denying the defendant Dellasse the right to show that the said Cummings was entitled to the possession of said property as bailee for defendant Dellasse. In this view of the case, the other points raised by defendant Dellasse need not be discussed.

The judgment will be reversed and the cause remanded.

389 - 21787

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, a corporation,
Defendant in Error,

vs.

MONARCH LUMBER COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 20

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below), brought a fourth class contract action against plaintiff in error for the recovery of freight and demurrage charges on a car of lumber consigned to the latter. The jury found the issues for the plaintiff, and judgment having been rendered thereon by the court, defendant has brought the case before this court for review.

The first point raised questions the sufficiency of the statement of claim. It is urged by the defendant that no facts are set forth in said statement of claim from which it can be reasonably inferred that the plaintiff was the carrier of said shipment, or that there was an implied contract on defendant's part to pay the freight and demurrage charges in question.

Said statement alleges that plaintiff's claim is for freight and demurrage charges that accrued on a shipment of a car of lumber from Cascade, Missouri, to Michigan City, Indiana, by the Consolidated Store & Manufacturing Company to the defendant, and ordered by the defendant reconsigned

SOS 1.1.50

to the Haskell & Barker Car Company, at Michigan City, which latter company refused to accept said shipment; that defendant then ordered said shipment to Chicago. Then follows an itemized statement of the freight and demurrage charges, and an affidavit in support of said statement of claim. While it is not expressly alleged that plaintiff was the delivering carrier of the goods in question, this fact can be reasonably inferred from the averments contained in the statement of claim as above set forth. No issue having been taken thereon in the trial below, defendant impliedly admitted this fact, and is therefore not in a position to raise that question here. If the statement of claim was not sufficiently definite in any particular, defendant had the right to move for a more explicit and specific statement. Enberg v. City of Chicago, 271 Ill. 404. Under sec. 40 of the Municipal Court Act, ch. 37 R. S., it is not necessary to set forth a cause of action with the particularity required by the rules of common law pleading. The statute requires only a statement of the account or nature of the demand sued on. In our opinion, said statement of claim substantially conforms to the requirements thereof.

Defendant next complains that the court erred in admitting in evidence a copy of letter dated June 16, 1911, wherein the Haskell & Barker Car Company informed the defendant of its refusal to accept the car of lumber in question because of its alleged inferior quality. This merely tended to prove that the lumber was refused when tendered to the Haskell & Barker Car Company, and as there is ample other proof of such rejection in the record, it is difficult to perceive how the defendant could have been injured by its admission in evidence.

In examining a witness under sec. 33 of the Municipal

(XYZ 33345)

Court act, counsel for plaintiff read several questions and answers from a bill of exceptions purporting to contain his testimony in another case involving the same shipment of lumber, and asked the witness whether he gave such testimony on said trial. Defendant complains that by permitting counsel to interrogate the witness in this manner, the court committed reversible error. Counsel was evidently laying the foundation for impeaching the witness, - a right which he clearly had; and while permission was afterwards granted plaintiff's counsel to read in evidence the former testimony of this witness, we find, from an examination of the record, that he did not avail himself thereof, and hence defendant's contention on this point is not well taken.

Finally, it is contended that the jury were improperly instructed, in that part of the court's charge wherein they were told that

> "where a consignee accepts a shipment consigned to him he then becomes liable to pay carrier the lawful transportation charges which have accrued. It is not necessary that the shipment be physically delivered to the consignee to bind the latter for the charges. An acceptance may be shown by the action or conduct of the consignee in giving orders to have the shipment delivered to some other person."

This instruction, so far as we are able to observe, contains a correct statement of the law. (St. L. S. W. Ry. Co. v. Gramling, 133 S. W. 1129; Penn. R. Co. v. Titus, 138 N. Y. Supp. 325; M. P. R. R. Co. v. Am. Smelting & R. Co., 202 Fed. 720). The defendant, who was the consignee of the shipment in question, reconsigned this car of lumber to the Haskell & Barker Car Company, directing the plaintiff to collect its charges from such third party, and later, when the said company rejected the shipment, plaintiff, at the direction of the defendant, forwarded the car to the defendant at Chicago. These facts sufficiently show an acceptance of

> "Under a contract entitle a shipment contained to sue on them because liable to pay earlier the lawful remedies which have accrued. It is not necessary that this judgment be physically delivered to the employee to hand the letter for the shipper. No manufacturer can be shown by the action or conduct of the employee to relieve carrier to have the shipment daily and to some other person."

Rice Instruction, No Tax be or are able to showing, construe a contract statement of the law. (17 F. 2d. 24. 26. Comstock, 113 Fed. 1. Cooley, 2d. Ed. 2. 26. 2. 26. v. 26. Contracts 2 1. 26.; 2 Fed. 1901). The Statement, who was the acceptance of the shipment to Omaha, terminated this car of lumber to the Omaha & Colfax Car Company, directing the plaintiff to contact its agents for unloading the car, but later, when the said Company refused the Shipment, plaintiff, at the direction of the defendant, forwarded the car to the defendant at this address, no like, from an examination of the record, plaintiff's counsel is not in evidence the formal testimony of the witness, Mr Tidd, from an examination of the record, does it not seem that Plaintiff Company, and Donna defendant's contention on this point is not well taken.

Finally, it is contended that the jury were improperly instructed, in the court of the court's charge to the jury on them because liable to pay earlier the lawful remedies which have accrued. It is not necessary that this judgment be physically delivered to the employee to hand the letter for the shipper. No manufacturer can be shown by the action or conduct of the employee to relieve carrier to have the shipment daily and to some other person."

the shipment by the defendant. On this state of the record, there can be no question that plaintiff became liable for the charges accruing thereon.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

463 - 21861

J. B. KILROY,
Appellee,

vs.

MARGARET T. McGOVERN and MICHAEL H. McGOVERN,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

202 I.A. 34

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein sought to be reversed was entered on May 29, 1915, against appellants jointly, who contend, inter alia, that the said judgment cannot be sustained because of a total lack of evidence in the record to show any liability on the part of Margaret T. McGovern. Appellee, on the other hand, moves this court to dismiss the appeal, on the ground that the judgment appealed from is not a final one. This motion is based upon the contention of appellee, that said judgment of May 29th was vacated and set aside by a subsequent order of court.

The record in this case shows that the judgment herein presented for review was entered on May 29, 1915, during the May term of the Circuit court; that on July 6, 1915, - during the June term thereof - the court entered an order, directing that the said judgment be vacated and set aside, and the suit dismissed as to the said Margaret T. McGovern, and that said order be entered nunc pro tunc, as of June 4, 1915. The bill of exceptions shows that at the time of the entry of this nunc pro tunc order, the court stated that it was relying solely upon its recollection of what transpired on June 4th, at the May term of said court. On this state of the record, the order of July 6th was null and void; and the

J. S. KIDWAY,
Appellee,

vs.

MARGARET C. KIDWAY and EDWARD E. KIDWAY,
Appellants.

APPEAL FROM CHANCERY COURT.

CASE DOUBTFUL.

MR. JUSTICE MCCARDLE DELIVERED THE OPINION OF THE COURT.

The judgment herein sought to be reversed was entered on May 29, 1915, against appellants jointly, who contend, first, that the said judgment cannot be sustained because of a total lack of evidence in the record to show any liability on the part of Margaret C. Kidwayer. Appellee, on the other hand, moves this court to dismiss the appeal, on the ground that the judgment appealed from is not a final one. This motion is based upon the construction of appellee, that said judgment of May 29th was vacated and set aside by a subsequent order of court.

The record in this case shows that the judgment herein complained for review was entered on May 29, 1915, during the May term of the Circuit court; that on July 6, 1915, - during the June time thereof - the court entered an order, directing that the said judgment be vacated and set aside, and the suit dismissed as to the said defendant C. Margaret, and that said order be entered nunc pro tunc, as of June 4, 1915. The bill of exceptions shows that at the time of the entry of this nunc pro tunc order, the court stated that it was relying entirely upon its recollection of what transpired on June 4th, at the May term of said court. On this state of

trial court, apparently realizing that in entering this nunc pro tunc order after term time it was acting without jurisdiction and contrary to law, expressed the opinion that it would be criticised by this court for so doing. In justification of its conduct in this regard, however, the trial Judge stated that he was acting in the interest of right and justice. We cannot agree with the conclusion that right and justice can be advanced by a court while acting without jurisdiction and contrary to law.

It is contended by appellee, however, that although the common law record makes no mention of any order having been entered on June 4th, yet the bill of exceptions recites that such order was entered on said date, in which event the latter should prevail; and in support thereof invokes the rule that where the bill of exceptions and the common law record are in conflict, the former prevails. We are of the opinion that such rule has no application here. While it is true, that where the recitals in the record and in the bill of exceptions are at variance the latter prevails, yet the rule cannot be extended to supply an order which does not appear in the record, as in the case at bar. The record now before us is barren of any minute or memorial made by the trial Judge during the term time, which would authorize the entry of a nunc pro tunc order after the term has expired. Counsel for appellee, in requesting the entry of the said nunc pro tunc order, explained to the court that a similar order had been allowed on June 4th but as the record made no mention of it, the entry thereof had evidently been overlooked by the minute clerk. A situation somewhat akin to the one now confronting this court arose in the case of Wesley Hospital v. Strong, 233 Ill. 153, and the court, in dis-

Penley Hospital v. Stone, 149 Ill. 190, and the court, in dis-
tinguishing this case in the case of
the one now considered, explained to the court that
overlooked by the third party. A distinction somewhat akin to
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tions recites that such order was entered on said date, in

Jurisdiction was contrary to law.

It is contended by appellee, however, that
jurisdiction can be maintained by a court while acting without
jurisdiction. We cannot agree with the conclusion that right and
justice. We cannot agree with the conclusion that right and
justice. We cannot agree with the conclusion that right and
justice

posing of it, used the following significant language, p. 159:

> "The fact that a particular order has been made by the court at a previous term, if it is not of record, can only be shown 'by the production of some note or memorandum from the records or quasi records of the court, or by the judge's minutes, or some entry in some book required to be kept by law, or in the papers on file in the cause. It cannot be determined from the memory of the witnesses or by the recollection of the judge himself. '" (Citing cases.)

And in meeting the further contention advanced there, that the bill of exceptions supplied the omission, the court continued:

> "It is manifest that a note or memorandum which would authorize the amendment of the record made at a previous term must be a note or memorandum which was made during that term, otherwise the rule would amount to nothing. For this reason the recitals in the appeal bond and the bill of exceptions are without significance."

So in the case at bar, the recitals in the bill of exceptions upon which appellee relies, must be held insufficient to warrant the entry of a nunc pro tunc order after term time. Therefore, the said judgment of May 29th, never having been effectually vacated, appellee's motion to dismiss the appeal must be denied.

This brings us to a consideration of appellant's contention that there is no evidence in the record to sustain the judgment as against Margaret T. McGovern. Inasmuch as the verified plea of Margaret T. McGovern denied joint liability with Michael H. McGovern, it was incumbent on appellee to establish her joint liability by competent evidence. From an examination of the record, we find that appellee has utterly failed to make such proof, and this fact is also admitted by appellee. Therefore the judgment must be reversed and the cause remanded.

In this view of the case, the other points raised by appellants, while perhaps not unimportant, may be disposed

posing of it, used the following significant language, p.

139:

> "The fact that a petition for error has been made by the court at a previous term, if it is not of record, can only be shown by the production of some note or memorandum from the records or files of the court, or by the judge's minutes, or some entry in some book required to be kept by law, or in the statute or file in the case. It cannot be testified from the memory of the witnesses or by the recollection of the judge himself." (Citing cases.)

And in meeting the further contention advanced here, that the bill of exceptions supplied the omission, the court continued:

> "It is manifest that a note or memorandum which would authorize the amendment of the record made at a previous term must be a note or memorandum which was made during that term, otherwise the rule would amount to nothing. For this reason the recitals in the appeal bond and the bill of exceptions are without significance."

So in the case at bar, the recitals in the bill of exceptions upon which appellee relies, must be held insufficient to warrant the entry of a nunc pro tunc order after term time. Therefore, the said judgment of May 15th, never having been effectually vacated, appellee's motion to dismiss the appeal must be denied.

This brings us to a consideration of appellant's contention that there is no evidence in the record to sustain the judgment in favor of Margaret T. Hoover. Inasmuch as the verified plea of partners T. Hoover and Hoover, in solidity with Ida M. Hoover, is a document on appellee to establish her joint liability by competent evidence. Upon an examination of the record, we find that appellee has utterly failed to make such proof, and this fact is also admitted by appellee. Therefore the judgment must be reversed and the cause remanded.

In this view of the case, the other points raised by appellant, while perhaps not unimportant, may be disposed

of with the observation that if through inadvertence error crept into the record, it is fair to assume that on a retrial of the case it will not recur.

REVERSED AND REMANDED.

22654

SADIE LABOWITCH, personally and as heir at law of her deceased husband, Louis Labowitch, and as Executrix under his last will and testament,

Appellee,

vs.

DAVID LABOWITCH, IDA LABOWITCH, LEOPOLD LABOWITCH, BENJAMIN LABOWITCH, BETTIE GRUNFELD, LOTTIE BADNER, IGNATZ BADNER, KATE GROSSMAN, JOSEPH GROSSMAN, ESTHER HAMBOURGER, JACOB I. HAMBOURGER, and Unknown Heirs at Law of Louis Labowitch, Deceased, and Unknown Owners, on appeal of David and Ida Labowitch,

Appellants.

INTERLOCUTORY ORDER.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

202 I.A. 35

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse an interlocutory order appointing a receiver to take charge of and manage the assets of a certain business and the property alleged to have been owned by one Louis Labowitch, deceased, and enjoining appellants (defendants below), from interfering with said receiver in the exercise of his functions as such.

The bill ~~of complaint~~, which was filed by ~~appellee~~ complainant both as executrix ~~of the last will and testament of Louis Labowitch, deceased~~, and in her own right as ~~his~~ widow and heir at law, ~~after setting forth the names of the surviving heirs of the deceased,~~ alleged inter alia:

That ~~the~~ deceased had for many years prior to his death owned and conducted the business of selling clothing and merchandise on ~~the~~ installment plan, under the name ~~and style~~ of the "Union Credit Clothing House," in ~~the city of~~

.Sr.

.Spielman,

.DISTRIBUTION OFFICE.

.POSTAL PENS

.DISTRICT COURT.

.CODE CLERIY.

.202 I.A. 35

Chicago.

That during ~~the year~~ 1911 ~~the said~~ Louis Labowitch became seriously ill, and in May, 1912, was compelled to enter a health resort; and from that time until his death, - ~~which occurred~~ in October, 1915 - was a patient in ~~various~~ sanitariums, ~~being obliged to travel both in this and in foreign countries, in search of health; that because of said illness, he~~ and was unable to attend to his business during his illness and ~~properties, from a time prior to said May, 1912, until his death~~, and that his business was conducted and his property managed by his brother, defendant David Labowitch, ~~one of the defendants.~~

~~That complainant has had practically no business experience and no knowledge of the manner in which her said husband's estate was managed~~, and that ~~she knew~~ complainant knows nothing of what ~~properties the~~ testator's estate ~~of her deceased husband~~ consisted, except as ~~she had been~~ informed by ~~the~~ defendant David Labowitch.

That defendant David Labowitch ~~was and~~ had been for several ~~a number of~~ years thoroughly familiar with the said business and properties ~~of said Louis Labowitch~~, and from ~~a date~~ prior to May, 1912, to ~~the date of~~ the filing of the bill, had been the sole manager ~~and conductor of said business~~;

That during ~~the~~ illness of ~~the said Louis Labowitch~~, ~~the said~~ defendant David Labowitch conducted ~~said~~ the testator's business and controlled said properties in the capacity of a trusted agent, and since the death of ~~the said Louis Labowitch~~, continued to conduct ~~same and manage said properties of the decedent~~, and has wrongfully excluded ~~and continued to exclude the~~ complainant from ~~any~~ participation therein, and ~~that said defendant~~ has wrongfully failed and refused to yield possession and control of ~~said properties~~ to ~~the~~ complainant;

Chicago.

~~and that his conduct is based upon the wrongful contention~~ that all or practically all, ~~of said~~ property of ~~the said Louis Labowitch~~ was owned by an ~~alleged~~ copartnership, ~~the members of which were the said~~ composed of testator Louis Labowitch and ~~the said~~ David Labowitch;

That the management of ~~said~~ business and properties involved ~~the handling of~~ extensive and complicated accounts ~~extending over a period of years~~; that complainant had no knowledge ~~thereof~~ and was unable to ~~ascertain~~ obtain full information ~~as to the dealings and transactions carried on by the defendant David Labowitch on behalf of her deceased husband's estate~~; that ~~the said~~ defendant David Labowitch has ~~full and complete~~ information ~~thereof~~, and that full, true and complete disclosure of ~~said~~ information is necessary to the maintenance of ~~said~~ bill ~~of complaint~~, and the ascertainment of the rights of the parties.

Then follows a recital of the ~~alleged~~ property ~~alleged to have been owned by the said Louis Labowitch~~ at the time of his death, ~~the~~ prayer for an accounting ~~between the parties~~, and the appointment of a receiver.

On July 19, 1916, upon notice and hearing, the court entered an order appointing a receiver to take charge of and manage the said business and properties and restraining defendant David Labowitch and others from interfering with said receiver while in the discharge of his duties as such.

It is urged on this appeal, first, that the record does not show sufficient grounds to sustain the order of court appointing the receiver; and, second, that said order is fatally defective in failing to require complainant to furnish a bond as required by statute.

After a careful examination of the entire record, consisting of the verified bill and numerous affidavits

submitted in behalf of both parties, we are of the opinion that there was a sufficient showing made by complainant to warrant the court in entering the order complained of. Complainant should however, be required to give bond, as provided by Sec. 53, Ch. 22, R. S., unless for good and sufficient cause shown, the furnishing of a bond is dispensed with, in which event the order should so state. Fluke v. Phelps, 177 Ill. App. 95.

The order appointing the receiver must, therefore, be reversed.

REVERSED.

2157

75 - 21456

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ILLINOIS LIFE INSURANCE COMPANY, (a corporation), and WILLIAM T. PURSELL,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 38

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

A suit was begun in the Municipal Court by defendant in error (plaintiff below), to recover from plaintiffs in error (defendants below), the penalty provided by Sec. 29, of Chapter 73, Hurd's R. S. 1911. There was a trial by jury resulting in a verdict against defendants for $700.00 and costs of suit, and judgment on the verdict. Albert F. Mecklenburger appeared as counsel on behalf of the people. Defendants' counsel called the court's attention to the want of proper authority of said Mecklenburger to represent the people. Mecklenburger produced a letter from the State's Attorney authorizing him to act as special State's Attorney, but no order to that effect was entered by the court, as should have been done. Gilbert v. People, 121 Ill. App. 423. While the State's Attorney signed the pleadings filed in behalf of plaintiff, he did not participate in the trial of the case.

The appointment of a special State's Attorney is a judicial act and a court speaks only by its record. The statute under consideration is explicit in its terms. It provides that the penalty shall "be sued for and recovered

[illegible]

[illegible]

[illegible]

in the name of the People of the State of Illinois by the State's Attorney," etc., and every other mode of procedure to recover such penalty is excluded. People v. Columbian Nat. Life Ins. Co., 187 Ill. App. 37; People v. Hartford Life Ins. Co., 186 Ill. App. 117.

The judgment of the Municipal Court is therefore reversed and the cause remanded for proper procedure.

REVERSED AND REMANDED.

in the name of the people of the State of Illinois by the State's Attorney," etc., and verify other acts of procedure to remove such penalty is evident. Ferris v. Glenshaw Mfg. Co., 284 Ill. 192, 197; Dennis v. Clancy, 268 Ill. 160. See Ill. Rev. Stat. 1941, ch. 112.

The judgment of the municipal court is therefore reversed and the cause remanded for proper procedure.

REVERSED AND REMANDED.

90 - 21477.

202 I.A. 39

N. C. MELING,
Defendant in Error,

vs.

MARY J. LAMB,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action brought to recover $150.00 for necessary surgical services rendered to the son of plaintiff in error (defendant below), during his minority, resulting in a finding of the issues against defendant and judgment for $100.00 and costs. Defendant was divorced from her husband, and by virtue of the decree, custody of said minor, who at the time of the operation was about nineteen years old, was given to the husband. The son had been living with his uncle in Chicago for at least two or three months prior to such operation, during such time he was earning wages, did not contribute to the support of his mother, and the evidence tends to show, was not subject to his mother's control or influence after he had left her home.

The uncle, Richard Lamb, testified that defendant told him "she could not do anything" with said son, that he had gone away and that she would like to have him live with the witness. The operation was performed July 6, 1913, at about 9 P. M., and the uncle testified that earlier during that day he talked by telephone to some one at defendant's home (whom he thought was one of defendant's younger sons,

No. 1417.

Defendant in error,

vs.

Plaintiff in error.

Error to

CHICKASAW COUNTY

Of counsel.

Opinion.

This is an action brought to recover $150.00 for necessary surgical services rendered to the son of plaintiff in error (defendant below), during his minority, resulting in a finding of the issues against defendant and judgment for $100.00 and costs. Defendant was divorced from her husband, and by virtue of the decree, custody of said minor, who at the time of the operation was about nineteen years old, was given to the husband. The son had been living with his uncle in Chicago for at least two or three months prior to said operation, during such time he was earning wages, did not contribute to the support of his mother, and the evidence tends to show, was not subject to his mother's control or influence after he had left her home.

The uncle, Richard Lamb, testified that defendant told him "she could not do anything" with said son, that he had gone away and that she would like to have him live with the witness. The operation was performed July 7, 1913, at about 9 P. M., and the uncle testified that earlier during that day he talked by telephone to some one at defendant's home (whom he thought was one of defendant's roomers, some

but was not certain), informing such person of the condition of defendant's son. Defendant denied having received such message, and testified that she did not learn of such operation until the following day. It is not claimed that either plaintiff (the attending physician), or the uncle had any direct communication with defendant before the operation. Neither is it contended that plaintiff, or any one in his behalf, communicated with the father, who resided in Chicago, and was then employed in the City Hall at a salary of $200.00 a month. The son continued to live with his uncle, following the operation, for a period of two or three weeks, resuming his former employment. At the time of the trial, he was supposed to be in California.

That the services rendered were necessary is not disputed. Under Sec. 15, Chap. 68, Hurd's R. S. 1874, the wife, as well as the husband, became liable for family expenses. By virtue of the decree of divorce, however, the relation of husband and wife no longer existed, and by the terms of such decree , the legal obligation for the necessary expenses of said minor son was imposed upon the husband. It is not claimed that defendant made any express promise to defray the expenses of said operation , and there was no legal duty imposed upon her, under the facts and circumstances in evidence, from which an implied promise can be inferred. Gotts v. Clark, 78 Ill. 229; Hunt v. Thompson, 3 Scam. 179.

The judgment of the Municipal Court of Chicago will therefore be reversed.

REVERSED.

158 - 21550

ALEX FRIEND, doing business as ALEX FRIEND & COMPANY,
Defendant in Error,

vs.

HENRY MELVIN MAHIN and ELLA LOUISE MAHIN,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 40

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case suit was commenced to recover a commission for procuring a contract of sale of certain real estate, resulting in a finding of the issues against defendants(plaintiffs in error), and judgment assessing plaintiff's (defendant in error's), damages at the sum of $220.00 and costs of suit.

It is contended by plaintiff's counsel that defendants' assignments of error, are not available in this court, because made jointly, and not severally. In this case defendants were sued jointly, the judgment is a joint judgment, and if erroneous as to one of the defendants, must be reversed as to the other. "The assignments of error should be considered as joint and several, or joint or several, according to the nature of the error assigned, and as affecting the respective plaintiffs in error." Greenberg v. The People, 125 Ill. App. 626, 630. The assignment of error is sufficient.

In view of the conclusion arrived at by this court, it is only necessary to consider defendants' assignment of error that the contract in question was not

plaintiffs in error.

vs.

defendants in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

plaintiffs in error.

2 0 2 I.A. 40

MR. JUSTICE MCCURDY DELIVERED THE OPINION OF THE COURT.

In this cause suit was commenced to recover a commission for procuring a contract of sale of certain real estate, resulting in a finding of the issues against defendants(plaintiffs in error), and judgment accordingly plaintiff's (defendant in error's), damages at the sum of $250.00 and costs of suit.

It is contended by plaintiff's counsel that defendants' assignments of error, are not available in this court, because wholly joinly, and not severally. In this case defendants were most jointly, the judgment is a joint judgment, and if erroneous as to one of the defendants, must be reversed as to the other. "The assignments of error should be considered as joint and several, or joint or several, according to the nature of the error assigned, and as affecting the respective plaintiffs in error." Goldmeyer v. The People, 145 Ill. App. 648, 650. The assignment of error is sufficient.

In view of the conclusion arrived at by this court, it is only necessary to consider defendants' assignment of error that the contract in question was not

enforceable because of facts known to plaintiff before contract was made. By the terms of the contract, defendants agreed to sell to Charles E. Tibbles the premises in question, to furnish him a complete merchantable abstract of title, and to convey to him a good and merchantable title. Tibbles, before signing said contract, stated to plaintiff's representative, Mr. Zuckerman, who negotiated said contract of sale, that he was unwilling to accept a guaranty policy because he had once purchased improved property, the buildings upon which "extended over on adjoining property, and that he had a great deal of trouble growing out of it." Tibbles refused to purchase, because a certain brick building upon the property in question was partly in a public alley and partly upon premises adjoining to the south the premises in question, and owned by a different party. Thereupon the contract was cancelled by mutual consent of Tibbles and the defendants. The evidence tends to show that Tibbles, when he signed said contract, did not have knowledge of such encroachment.

Henry Melvin Mahin, one of the defendants, testified that he purchased said premises from plaintiff and learned from a survey thereof, obtained from the latter, of the encroachment in question. A second survey was made after the execution of the contract. The evidence tended to show that plaintiff was trustee of the property prior to its purchase by Mahin. We are clearly of the opinion that the finding of the trial court that "At the time the Tibbles contract was entered into, the plaintiff was reasonably chargeable with notice that there was an encroachment substantially as disclosed in the survey furnished to vendee", is supported by a

in the survey furnished to vendee", is supported by a finding that there was an encroachment substantially as disclosed into, the plaintiff was reasonably chargeable with notice court that "At the time the Tip Top contract was entered clearly of the opinion that the finding of the trial the property prior to its purchase by Dunin. No evidence tended to show that plaintiff was trustee of was made after the execution of the contract. The latter, of the encroachment in question. A second survey and learned from a survey thereof, obtained from the testified that he purchased said premises from plaintiff Henry Melvin Dunin, one of the defendants,

said contract, did not have knowledge of such encroachment. The evidence tends to show that Tibbles, when he signed concealed by mutual consent of Tibbles and the defendants. and owned by a different party. Thereupon the contract was premises adjoining to the south the premises in question, question was partly in a public alley and partly upon because a certain brick building upon the property in trouble growing out of it." Tibbles returned to purchase, on adjoining property, and that he had a great deal of improved property, the buildings upon which "extended over accept a quit-claim policy because he had once purchased negotiated said contract of sale, that he was unwilling to stated to plaintiff's representative, Mr. Buckerman, who merchantable title. Tibbles, before signing said contract, abstract of title, and to convey to him a good and premises in question, to furnish him a complete merchantable defendants agreed to sell to Charles T. Tibbles the contract was made. By the terms of the contract,

enforceable because of facts known to plaintiff before

preponderance of the evidence. It was shown by the evidence that such encroachment had existed continuously for 24 years next preceding the signing of said contract and plaintiff's counsel therefore contend that such encroachment did not constitute a defect of title. The purchaser was not bound to accept title to the strip of land in question resting merely upon adverse possession. Attebery v. Blair, 244 Ill. 363. Plaintiff did not present to defendants a purchaser who entered into a valid, binding and enforceable contract, and under the facts and circumstances in evidence, he was not entitled to recover a commission from defendants. Quinlan et al. v. Towle, 185 Ill. App. 592; Lawrence v. Rhodes, 188 Ill. 96-102.

The judgment of the Municipal Court is therefore reversed.

JUDGMENT REVERSED.

FINDING OF FACTS.

Defendant in error had knowledge of an encroachment constituting a defect in title to the premises in question of which he negotiated said contract of sale, and knew before said contract was signed that the purchaser would not accept said property with such defect of title.

1MM - 1500.

PLEADING ON RIGHT.

Demurrer in error had knowledge of an
encumbrance constituting a defect in title to the
premises in question of which he neglected said
contract of sale, and knew before said contract was
signed that the purchaser would not accept said
property with such defect of title.

231 - 21626

ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago, for the use of Staver Carriage Company, a corporation,

Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW YORK and DAVID JETZINGER,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

202 I.A. 42

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This case was tried upon an agreed statement of facts, resulting in a finding of the issues in favor of defendant in error and judgment for costs against plaintiff in error. By this appeal it is sought to reverse said judgment upon questions of law only. It does not appear that any propositions of law were submitted to the trial court, nor preserved in the record for review by this court. It is a well settled rule of law that in a trial without a jury it is not only necessary to submit propositions of law to the trial court but also to preserve in the record the rulings of the court on such propositions, before this court can review the principles of law governing the case. Flodin v. Lutes Co., 191 Ill. App. 195, 197. Overland Motor Co. v. Tennant, 195 Ill. App. 6, 7. The judgment of the Municipal Court will therefore be affirmed.

JUDGMENT AFFIRMED.

MUNICIPAL COURT
OF CHICAGO.

va.

Defendants in Error.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This case was tried upon an agreed statement of facts, resulting in a finding of the issues in favor of defendant in error and judgment for costs against plaintiff in error. By this appeal it is sought to reverse said judgment upon questions of law only. It does not appear that any propositions of law were submitted to the trial court, nor preserved in the record for review by this court. It is a well settled rule of law that in a trial without a jury it is not only necessary to submit propositions of law to the trial court but also to preserve in the record the rulings of the court on such propositions, before this court can review the principles of law governing the case. Flodin v. Intze Co., 191 Ill. App. 598, 147. Overland Motor Co. v. Tapment, 195 Ill. App. 6, 7. The judgment of the Municipal Court will therefore be affirmed.

JUDGMENT AFFIRMED.

319 - 21715

THE PITTSBURGH, CINCINNATI, CHICAGO and ST. LOUIS RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

OTTO H. HEDRICH, doing business as OTTO H. HEDRICH & CO.,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

202 I.A. 48

STATEMENT OF FACTS. Plaintiff in error, a common carrier, (hereafter referred to as the initial carrier), brought to Chicago a car of coal consigned to defendant in error, (hereafter referred to as consignee). The latter, upon notice of the arrival of said car at its destination wishing to reconsign same to a firm whose place of business was also in Chicago not on the line of railway of the initial carrier, but on that of the Pennsylvania Co. (a connecting carrier) directed the former to turn the car in question over to the latter for delivery, "charges to follow", which it did. The Pennsylvania Co. did not deliver the shipment to the ultimate consignee for several days because (a) freight charges due thereon and (b) demurrage which accrued because of said detention had not been paid. The consignee having paid to the Pennsylvania Co. demurrage on said car amounting to $20, made it the subject of a set-off in a suit brought against consignee by the initial carrier to recover freight charges on said shipment, which freight charges were paid by consignee before trial. The cause proceeded on the set-off and

OTTO G. [illegible], being duly sworn
as Otto G. [illegible], J.P.,
Defendant in error.

va.

OF CHICAGO.

PLAINTIFF IN ERROR. Plaintiff in error, a common carrier, (hereafter referred to as the initial carrier), brought to Chicago a car of coal consigned to defendant in error, (hereafter referred to as consignee). The latter, upon notice of the arrival of said car at its destination sidings to reconsign same to a firm whose place of business was also in Chicago not on the line of railway of the initial carrier, but on that of the Pennsylvania Co. (a connecting carrier) directed the former to turn the car in question over to the latter for delivery, "charges to follow", which it did. The Pennsylvania Co. did not deliver the shipment to the ultimate consignee for several days because (a) freight charges due thereon and (b) demurrage on said car amounting to $30, made it the subject of a set-off in a suit brought against consignee by the initial carrier to recover freight charges on said shipment, which freight charges were paid by consignee before trial. The issue presented on the set-off and

judgment was recovered thereon against the initial carrier. It is admitted that the initial carrier had no knowledge of, or interest in, said demurrage charges, and had received no part of same from the Pennsylvania Co. This writ of error is sued out to review the correctness of said judgment.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The consignee having reconsigned said shipment after it had reached its destination and having ordered the initial carrier to turn the same over to a connecting carrier for delivery to a different party, created a new contract. R. Deatwyler & Co. v. Oregon R. & Nav. Co., 176 Ill. App. 597-602, and cases therein cited.

An initial carrier is not liable for the acts of a connecting carrier after transportation has ceased. Gregg v. I. C. R. R. Co., 147 Ill. 550. "Demurrage charges are no part of and are separate and distinct from transportation charges, and do not arise, if at all, until the transportation has ended." C. & E. R. Co. v. Berwind-White Coal Min. Co., 171 Ill. App. 302-308.

There being no liability under the facts and circumstances in evidence on the part of the initial carrier to the consignee for demurrage paid by the latter to the connecting carrier, the judgment of the Municipal Court will be reversed.

REVERSED.

judgment was recovered thereon against the initial carrier.
It is admitted that the initial carrier had no knowledge of,
or interest in, said demurrage charges, and had received no
part of same from the Pennsylvania Co. This writ of error
is sued out to review the correctness of said judgment.

Mr. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

The consignee having reconsigned said shipment
after it had reached its destination and having ordered the
initial carrier to turn the same over to a connecting
carrier for delivery to a different party, created a new
contract. B. Thatcher & Co. v. Oregon R. & Nav. Co., 178
Ill. 490, 507-508, and cases therein cited.

An initial carrier is not liable for the acts
of a connecting carrier after transportation has ceased.
Green v. L. S. & M. S. Co., 140 Ill. 520. "Demurrage charges
are no part of and are separate and distinct from transporta-
tion charges, and do not arise, if at all, until the
transportation has ended." C. & E. I. Co. v. Jewett-White
Coal Min. Co., 171 Ill. App. 302-308.

There being no liability under the facts and
circumstances in evidence on the part of the initial
carrier to the connecting carrier, the judgment of the Municipal
Court will be reversed.

REVERSED.

332 - 21728

ELLEN WHITE, by Mary F. White, her next friend,
Plaintiff in Error,

vs.

FRANK T. BOYDSON and JOHN W. SNYDER,
Defendants in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 49

STATEMENT OF FACTS. Plaintiff ~~in error, then a~~ minor, suing by her ~~next friend~~, brought this action against defendants in error to recover damages for personal injuries. Upon the trial, the court at the close of plaintiff's evidence, directed a verdict of not guilty, which verdict was returned and judgment entered thereon. This writ of error was sued out to review that judgment.

Plaintiff's evidence tended to show the following ~~state of~~ facts: - Defendants were ~~engaged in the~~ construction ~~of~~ a building which had progressed to the second story, ~~and~~ in the walls of which were openings, unbarricaded, ~~left~~ for doors and windows. Material was ~~hoisted~~ raised from the first ~~to the second~~ story ~~of the building~~ by ~~means of~~ a hoist consisting of two platforms, so arranged that when one platform went up, the other ~~platform~~ went down, ~~It was~~ and operated by a cable, ~~(which went~~ going over a wheel or pulley ~~near the rear entrance of the building)~~ to which a horse was hitched. The hoist was inside of and near the front entrance, and a sand pile was outside of and at the rear of, the building. Children played on this sand pile, and in the building, ~~while the workmen were there~~, and after working hours. Boys ~~had been making a practice of~~ playing on the hoist when the work-

men were absent. ~~A number of~~ The ~~boys~~ would get on one platform ~~of the hoist~~ on the second floor and their weight would cause it to descend and the other platform to ascend. ~~They would then return to the second floor and repeat the operation~~. Before the boys could operate the hoist it was necessary ~~for them~~ to remove an iron pin ~~about a foot in length~~, ~~which was~~ placed through the wheel ~~in such a way~~ so as to prevent it from turning. On the day in question, a holiday ~~when the workmen were absent~~, this pin was pulled out by ~~one of the~~ a boy. ~~It was also necessary for them~~ To get to the second floor ~~and to accomplish this~~, they procured a ~~thirteen foot~~ ladder ~~which was lying on the floor~~ and placed it ~~up~~ against the bricks of the second floor. ~~The~~ Plaintiff, ~~then nine years and five months old~~, while playing around her home, (which was across the alley ~~from said building~~), was attracted ~~to the building~~ by the noise and laughter of the boys ~~inside the same~~. She had never ~~previously~~ been in the building and did not know of ~~the presence of~~ the hoist ~~there~~. She entered the rear of the building ~~from the alley~~, watching the boys ~~go up and down~~ on the hoist and ~~watching~~ the wheel revolving. When the wheel stopped she placed her hand on it, ~~when~~ after it again started, resulting in the loss of ~~one of her~~ a finger.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The declaration consisted of two counts and charged the defendants with negligence in permitting the windows and doorways of a building in the course of construction to be open and not barricaded, and a machine elevator or hoist, which was attractive to children, to be exposed and not

guarded, so that plaintiff, who was attracted thereto, without fault on her part, was injured, etc.

In this class of cases an essential condition to liability is that the attractive thing, or something inseparably connected with it, must be the proximate cause of the injury. Seymour v. Union Stock Yards & Transit Co., 224 Ill. 579. Another necessary element of liability for an injury to a child so attracted is

> "that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be." McDermott v. Burke, 256 Ill. 401, 406, 7.

In the case of McDermott v. Burke, supra, upon which defendants' counsel rely, the only thing attractive to children was a sand pile, which the court there held was not dangerous, and that there was no wrong in maintaining it unguarded. In that case there was an entire failure of evidence that the hoist and machinery (a) were attractive to children, and (b) could be seen from the public street. In the instant case the evidence tended to show the presence of both of these elements. Children almost daily played on and around said hoist, while the workmen employed there were absent, and there was some evidence tending to show that it was visible ffom the public street. ~~There was evidence~~ that the building "was all open * * * nothing there along the front * * * but the wide openings * * * all open in the back and front * * * all wide open." The building fronted on a public street and the evidence tended to show that a portion thereof was to be occupied for a store. If, therefore, it was "all wide open" a jury might well infer that such hoist which consisted of two platforms, each sufficient in size to

[illegible] the [illegible] [illegible] [illegible]

place a wheelbarrow thereon, might well be seen from the street. While the evidence upon this question was meagre, we think it was sufficient to require submission of the question to the jury.

While it is true, as contended by defendants' counsel, that plaintiff herself was attracted to the building by the "hollering" of the boys, who, the evidence strongly tends to show, were attracted from the street by such hoist and machinery, the real test is whether it constituted an attractive nuisance, and was the proximate cause of the injury.

The judgment of the Superior Court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

344 - 21741

WELDON WEBSTER, Receiver,
Plaintiff in Error,

vs.

IDA A. OLSON et al.,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 52

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case, the final decree was entered against one only of several defendants. An appeal from an order dismissing the bill as to certain defendants was taken by plaintiff in error prior to the entry of said final decree and was dismissed by this court because not taken from a final order. The transcript of record in that case had been, by leave given here, refiled in this case. Attached thereto are the assignments of error made on such appeal. An additional transcript is also filed herein showing the proceedings subsequent to the order appealed from, including the final decree aforesaid, but no new assignments have been filed as required by rule 12. We cannot treat the assignments of error which were so filed in a former proceeding in this court and which relate only to proceedings anterior to the final decree as bringing the final decree itself before us for review. This point is well taken by defendants in error who have been brought before this court, and hence under said rule the suit must be dismissed. It also appears that the writ does not bring before us all the co-defendants below as it should. "The writ of error must agree with the

Plaintiff in error,

vs.

DEFENDANTS IN ERROR.

CIRCUIT COURT,

COOK COUNTY.

Defendants in error.

MR. JUSTICE MCCONNELL DELIVERED THE OPINION OF THE COURT.

In this case, the final decree was entered against one only of several defendants. An appeal from an order dismissing the bill as to certain defendants was taken by plaintiff in error prior to the entry of said final decree and was dismissed by this court because not taken from a final order. The transcript of record in that case had been by leave given here, refiled in this case. Attached thereto are the assignments of error made on such appeal. An additional transcript is also filed herein showing the proceedings subsequent to the order appealed from, including the final decree aforesaid, but no new assignments have been filed as required by rule 18. We cannot treat the assignments of error which were so filed in a former proceeding in this court and which relate only to proceedings anterior to the final decree as bringing the final decree itself before us for review. This point is well taken by defendants in error who have been dismissed before this court, and hence under said rule the suit must be dismissed. It also appears that the writ does not bring before us all the co-defendants in error as it should. "The writ of error must agree with the

record, and in order to bring the decree up for review by a writ of error, all who were defendants in the original suit who are alive, must join in the writ of error, so that the whole case may be disposed of, and that the record may agree with the record below." Cooke v. Cooke, 194 Ill. 225; Wuerzburger v. Wuerzburger, 221 Ill. 277; Clark v. Zaleski, 268 Ill. 427.

We have, however, examined plaintiff in error's amended and substituted bill, and are of opinion that the Circuit Court did not err either in dismissing the bill for insufficiency as to certain defendants nor in denying plaintiff in error's petition for a change of venue on the ground of want of notice. For failure to join necessary parties, and to file assignments of error in compliance with the rule of this court the writ should be dismissed.

WRIT DISMISSED.

WRIT DISMISSED.

375 - 21772

JAMES M. FAIR,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 53

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Defendant in error, hereafter referred to as plaintiff, commenced a suit for wages against the City of Chicago, defendant, and recovered judgment therefor in the sum of $124.25. Plaintiff testified that as a result of a civil service examination in 1906 he was certified and appointed as a calker in the water pipe extension bureau of the City of Chicago and continued in such employment until Jan. 9, 1914, when he was laid off as a calker for lack of work and assigned to work as a laborer for 69 days, and then was again assigned to work as a calker. His salary as a calker was $4.50 a day, and as a laborer $2.75 a day. Plaintiff claims that many of his co-employees, who were certified and appointed to work as calkers subsequent to his alleged certification and appointment, were not laid off but continued to work as such, and that he is entitled to recover the difference between the sum which he received as laborer and that which he would have received as calker during that period. There is an entire failure of proof by any original record of the Civil Service Commission that plaintiff, at any time, was classified as a calker, and there

1943 - 1944

James B. Fain,

Defendant in Error,

vs.

City of Denver,

Plaintiff in Error.

Error to
District Court
of Denver.

2021 1/4-53

Mr. Justice Bouck delivered the opinion of the court.

Defendant in error, hereafter referred to as plaintiff, commenced a suit for wages against the City of Denver, defendant, and recovered judgment therefor in the sum of $[illegible].00. Plaintiff testified that as a result of a crazy quilt schedule in 1940 he was demoted and reduced in pay from $[illegible].00 a day to $[illegible].00 a day, and as a laborer $3.75 a day. Plaintiff claims that many of his co-employees, who were employed and promoted to work as engineers for an hour, and then were again reduced to duty as a laborer. His salary as a laborer was $4.40 a day, and as a laborer $3.75 a day.

Plaintiff claims that many of his co-employees, who were certified and promoted to work as engineers, were not late of his wages garnished and attached, and that he is entitled to recover the difference between the sum which he received as part compensation to work as engineer, and that he is entitled to his wages garnished and attached, and that he is entitled to recover the difference between the sum which he received as laborer and that which he would have received as engineer, during that period. There is no entire failure of proof by plaintiff, at any time, and although he a laborer, and there is only evidence of the trial relative thereto, and there is only evidence of the trial relative thereto, and there is only evidence of the trial relative thereto

is no competent evidence of his certification by said Commission to such position.

Plaintiff's counsel and the trial court evidently proceeded upon the theory that original evidence of such classification and certification was not necessary. The court erred in overruling motion of defendant's counsel made at the close of plaintiff's case, and again made at the close of all of the evidence, to find the issues for the defendant. The finding of the court is against the manifest weight of the evidence, and the judgment of the Municipal Court must therefore be reversed. But for the ruling of the court other evidence might have been introduced in support of plaintiff's contention, and for that reason the cause will be remanded.

REVERSED AND REMANDED.

423 - 21821

FLORA B. HUGHES,
Appellee,

vs.

JOHN DOBSON,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 54

STATEMENT OF FACTS. Appellee recovered judgment against appellant before a justice of the peace for damages sustained by plaintiff (appellee) for the loss of certain rugs and damage to other property. Upon appeal and a trial de novo in the Circuit Court, there was a verdict for plaintiff for $193 and upon the entry of a remittitur of $5, judgment for $188.

On Saturday, April 18, 1914, defendant, under a contract with plaintiff for hire, hauled plaintiff's household furniture, including six oriental rugs and a certain bed spring, from Glenwood to Chicago. On the Tuesday following, plaintiff's husband informed defendant that these rugs had not been delivered. A short time thereafter two of the rugs were found in Michigan Avenue, Chicago, and recovered by plaintiff through an advertisement. Only one witness, an expert, testified as to the value of the rugs in question, who stated that the fair reasonable market value of three of the rugs was $60 to $65 each, and that the fourth rug "was not worth very much", and fixed no value on same. Plaintiff testified that the cost of repairing said bed spring was $8.

Floyd S. [illegible],
Appellee,

vs.

[illegible],
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

2021.54

ABSTRACT OF FACTS. Appellee recovered judgment against appellant before a justice of the peace for damages sustained by plaintiff (appellee) for the loss of certain rugs and damage to other property. Upon appeal and a trial de novo in the Circuit Court, there was a verdict for plaintiff for $108 and upon the entry of a remittitur of $5, judgment for $103.

On Saturday, April 18, 1914, defendant, under a contract with plaintiff for hire, hauled plaintiff's household furniture, including six oriental rugs and a certain pet spring, from Glenwood to Chicago. On the Tuesday following, plaintiff's husband informed defendant that three rugs had not been delivered. A short time thereafter two of the rugs were found in Michigan Avenue, Chicago, and recovered by plaintiff through an advertisement. Only one witness, an expert, testified as to the value of the rugs in question, who stated that the fair reasonable market value of three of the rugs was $50 to $65 each, and that the fourth rug "was not worth very much", and fixed no value on same. Plaintiff testified that the cost of repairing said pet spring was $5.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Defendant seeks a reversal of the judgment upon the following grounds: that the Circuit Court did not have jurisdiction of the subject matter on such appeal because the evidence, it is alleged showed the value of the rugs in question exceeded $200; that plaintiff, after receiving the household goods delivered to her by defendant and paying him for moving same, failed to give him notice of the loss of the rugs in question until three days thereafter, and therefore cannot recover from defendant for same, unless the latter's negligence has been established; that there was no competent evidence as to the value of the rugs; that the verdict is against the manifest weight of the evidence.

On appeal, the jurisdiction of a Justice of the Peace is to be determined from facts appearing in evidence. Happel et al. v. Brethauer, 70 Ill. 166. The contention of defendant's counsel that the evidence shows the value of plaintiff's property (alleged to have been lost and damaged by defendant's negligence) exceeds $200 is not supported by the record.

The fact that plaintiff did not discover and report to defendant her alleged loss of the rugs in question until three days after her household goods had been delivered, would not defeat her action if the goods were shown to have been negligently lost by defendant.

A dealer in oriental rugs, sold to plaintiff the rugs in question, about ten years prior to the trial, but did not know as to their condition at the time of their alleged loss. He testified as to the fair cash market value of three of the rugs at the time of sale to plaintiff, and further testified that if said rugs had, since said sale,

59. Jurors accurately performed THE DUTIES OF THE COURT.

Defendant seeks a reversal of the judgment upon the following grounds: that the Circuit Court did not have jurisdiction of the subject matter in such appeal because the evidence, it is alleged showed the value of the rugs in question exceeded $500; that plaintiff, after receiving the insurance proceeds delivered to her by defendant and paying him for moving same, failed to give him notice of the loss of the rugs in question until three days thereafter, and that therefore cannot recover from defendant for same, unless the latter's negligence has been established; that there was no competent evidence as to the value of the rugs; that the verdict is against the manifest weight of the evidence.

On appeal, the jurisdiction of a Justice of the Peace is to be determined from facts appearing in evidence. Bagdi et ux. v. Lindgren, 76 Ill. App. 166. The contention of defendant's counsel that the evidence shows the value of plaintiff's property (claimed to have been lost and damaged by defendant's negligence) exceeds $500 is not supported by the record.

The fact that plaintiff did not discover and report to defendant her alleged loss of the rugs in question until three days after her home would rugs had been delivered, would not defeat her action if the rugs were shown to have been negligently lost by defendant.

A dealer in oriental rugs, sold to plaintiff the rugs in question, about ten years prior to the trial, but did not undertake to ascertain at the time of their alleged loss. He testified as to the fair cash market value of three of the rugs at the time of sale to plaintiff, and further testified that it was his opinion that each rug

been well cared for, they would have improved in value with lapse of time. Plaintiff testified that said rugs had been well cared for, during all of the time, and we are of opinion that said evidence taken as a whole, was sufficient to establish the fair market cash value of the rugs at the time in question.

Upon a careful consideration of all the evidence, we think it sufficient to sustain the verdict. The record being free from reversible error, the judgment of the Circuit Court will be affirmed.

JUDGMENT AFFIRMED.

JUDGMENT DEFERRED.

Great injury will be effected.

being free from reasonable error, the judgment of the
to take it sufficient to sustain the verdict. The record
Upon a careful consideration of all the evidence,

time in question.
in substantial the fact material such value of the proof at the
opinion that said evidence taken as a whole, was sufficient
well served for, during all of the time, and no use of
lapse of time. Plaintiff testified that said crops had been
have well served for, many years imposed in using with

198 - 20125

HARRIETTE L. COWIN,
Defendant in Error,

vs.

ARCTIC FUR SHOP, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 56

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff sued the defendant in the Municipal Court of Chicago to recover the sum of $200 for damages claimed to have been sustained by her by reason of her wrongful discharge by the defendant. The case was tried before the court without a jury, and a judgment of $200 was entered in favor of the plaintiff. Plaintiff was employed by the defendant as a milliner under a contract covering a period of six months. Before the expiration of the term she was discharged by the defendant.

The only ground for reversal urged by the defendant is that the discharge was justified by reason of the plaintiff's refusal to carry out the orders of the defendant, and for improper conduct towards the defendant's customers, and that this defense was established by a preponderance of the evidence. We have carefully examined the entire record and are clearly of the opinion that there is ample evidence to sustain the finding and judgment of the trial court.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

Incidents - cont'd.

Appointed to Court.

Sworn in.

Sworn at Bar.

Sworn at Bar as Ass.

Sworn at Bar as Ass.

Sworn at Bar as Ass

17 - 21196

CHARLES M. WEBER,
Defendant in Error,

vs.

HENRY C. KRUEGER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 57

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover commissions as a real estate broker for obtaining a purchaser for defendant's property. The case was tried before the court without a jury, and a judgment was entered in favor of the plaintiff for $83.75.

It is conceded that plaintiff was a duly licensed real estate broker, and that he obtained a purchaser for the defendant's property. Defendant's contention, however, is that plaintiff was a mere volunteer and therefore not entitled to recover broker's fees. The court found as an ultimate fact that plaintiff, at the request of the defendant, procured a purchaser for the defendant's property. This finding of the court, defendant contends, is not proved by a preponderance of the evidence. None of the evidence heard on the trial is in the record. We cannot, therefore, review the findings of fact made by the trial court.

Defendant also complains of the ruling of the trial judge on a proposition of law submitted. Whether this contention is tenable is immaterial since under the ultimate facts as found by the court, no judgment could stand except one for the plaintiff.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

[illegible]

[illegible]

[illegible]

309 - 21293

SIMON P. GARY,
Appellee,

vs.

CHARLES R. BEADLES and
ROBERTA D. BEADLES,
Appellants.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

202 I.A. 58

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action in assumpsit against the defendants to recover for legal services. The jury returned a verdict in favor of the plaintiff for $750 on which judgment was entered.

Plaintiff was employed by the defendants to represent them in two suits, one known as Camp v. Beadles and the other Levi v. Beadles. There is no contention that plaintiff is not entitled to recover for the reasonable value of his services in the Camp suit. In the Levi suit, however, defendants contend that no recovery can be had and that the court should have so instructed the jury.

The evidence tends to show that plaintiff is an attorney at law, and has been practicing in Chicago since 1896; that in 1905 the defendants had undertaken to build a twenty-four flat building in Chicago, and had arranged to borrow the necessary funds from a banker named Tisdelle. The work was commenced and some money furnished by Tisdelle, who afterwards got into financial difficulties, and in order to complete the building the defendants took the matter up with Levi with a view to inducing him to advance

[illegible]

vs.

[illegible]

[illegible]

[illegible]

the money needed to complete the building. In the negotiations ~~in this regard between~~ with Levi ~~and the defendants~~, plaintiff represented Levi and drew up the contracts and other papers. To protect himself, Levi had ~~the~~ defendants convey the property to him, ~~and he was~~ authorized him to collect ~~the~~ rents. ~~Defendants were also to pay him certain commissions for making the loan.~~ When the building was completed, Levi ~~proceeded to~~ collect the rents. Afterwards when Tisdelle ~~was making~~ demand ~~that he be repaid the amount he had advanced~~, Levi ~~took the matter up with the defendants with a view~~ to enforcing ~~Levi's~~ lien by foreclosure, ~~proceedings.~~ ~~The~~ defendant ~~Beadles~~ stated that he had no attorney and knew none, and Levi suggested ~~the~~ plaintiff. Afterwards ~~Levi and Beadles took the matter up with plaintiff, and~~, as plaintiff testified, Beadles asked plaintiff if he could represent ~~the~~ defendants in the foreclosure suit, ~~taking into consideration~~ the fact that plaintiff had for years represented Levi and was his attorney in reference to this very loan; ~~that~~ plaintiff said, "if there is no controversy between you and Mr. Levi, I think I can represent you, ~~all right~~, but if there is any ~~controversy between you and Mr. Levi, whether I could represent you or not,~~ you could never feel that I did the work right, and I would not want to do it." Beadles ~~then~~ said he would employ plaintiff with the understanding that he could change attorneys at any time, which was agreed to ~~by plaintiff~~. Levi was represented in the foreclosure suit by other counsel. Plaintiff filed a formal answer ~~on behalf of the~~ for defendant, the case was referred to a master, and ~~much~~ testimony ~~was~~ introduced. ~~It appears that~~ the principal contest before the master was between Tisdelle and Levi, and ~~that there was~~ little or no ~~controversy~~ between Levi and ~~the~~ defendants. It seems to have been ~~the view of~~ Levi and ~~the~~ plaintiff to de-

feat Tisdelle's claim by allowing Levi's claim in full, which was a first lien and superior to that of Tisdelle. Numerous hearings were had before the master, and in August, 1908, he made a preliminary report. During the time the case was before the master, which extended over a considerable period plaintiff contends that he was endeavoring to settle the matter with Levi; that in 1908 he suggested to the defendants that they secure another attorney, for the reason that a controversy had arisen between the defendants and Levi. This was done.

Defendants contend that plaintiff was disqualified to act as attorney for them, as he had been Levi's attorney concerning the subject-matter of the controversy, and that plaintiff was derelict in his duty towards the defendants in the foreclosure suit in that he did not question the ownership of certain bonds involved, in that proceeding; that Levi was not required to account for the rents collected by him, and that the defense of usury was not interposed. Plaintiff testified that he did not question the ownership of the bonds, as it was not advisable to do so; that the question of the accounting for the rents collected by Levi was not a proper subject for consideration in the foreclosure suit, but that it was agreed by Levi and his counsel that Beadles was entitled to an accounting for the rents under a separate contract entered into between him and Levi, and that the defendants acquiesced in the position taken by plaintiff. The defendants testified that he insisted that an accounting be had in the foreclosure suit, and that testimony be introduced on this subject, but that plaintiff would not permit the same to be done. After plaintiff withdrew from the foreclosure suit, the defendants through their new counsel, after filing the necess-

ary pleadings, had the question of the accounting for the rents gone into.

It would serve no useful purpose to further discuss the evidence. Suffice it to say that we have carefully examined the entire record, and are clearly of the opinion that, regardless of the intention or motive of the plaintiff, he was in a position where he could not properly protect the interests of the defendants in the foreclosure suit. The rule that an attorney should not place himself in a position where he may be required to chose between conflicting duties, or be led to attempt to reconcile conflicting interests rather than to enforce to their full extent the interests which he alone should represent, is a rigid one. It has long been firmly established that an attorney cannot represent conflicting interest or undertake to discharge inconsistent duties, or undertake any adverse employment, no matter how honest may be his motives and intentions. People v. Gerold, 265 Ill. 448; Strong v. International Invest. Union, 183 Ill. 97. It follows, therefore, that the court erred in refusing to instruct the jury that the plaintiff could not recover for services rendered in the case of Levi v. Beadles.

The judgment of the County Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

any direction, when the condition of any movement for the
worst case.

It would appear to merely postpone to further lit-
igation. Holding it to may that we have ultra-
vires powers. Whether we are directly or in-
directly exercising that power, and are directly or
indirectly, by the evolution whereby we would not ordinarily
exercise the powers of the Corporation in the Corporation
unit. The rule that an ultimately abortive object is
a lawful one, may be relied to cloak between qualifying
and unlawful, or be led to attempt to reconcile qualifying
some Powers, even to [illegible] that fulfilment the ultra-
vires doctrine be strictly enforced, is a rigid one. It
does tend to be more flexible, but we ordinarily cannot
take advantage of it unless we can bring ourselves
precisely within it, or [illegible] any adverse implication.
In my view, the [illegible] may be fit reliance upon [illegible].

Yours [illegible],

[illegible]

[illegible]

[illegible]

407 - 21394

FRED DE FILIPPI,
Appellee,

vs.

SPRING VALLEY COAL COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 61

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a judgment of $15,500 entered in the Superior Court of Cook County, in favor of appellee for personal injuries.

The injuries sustained were the result of an accident which happened April 29, 1911, at appellant's coal mine, located at Spring Valley, Illinois, where the appellee, who was then about nineteen years old, was employed as a coal miner. On the morning of the date of the accident, appellee went down in the mine to work. On account of conditions in the mine, he could not work and returned to the bottom of the shaft. About nine o'clock in the morning, he, together with eleven other men were being hoisted from the bottom to the surface. As the cage in which the men were being hoisted reached the top, they started to step off but just as appellee was in the act of doing so, the cage dropped three or four feet, which caused the appellee to fall backward onto the cage. The engineer knowing the cage was dropping, immediately brought it back up, and appellee's left leg, which extended over the edge, was caught between the cage and the landing platform and was so crushed that it was necessary to amputate it about six inches below the crotch.

Appellant contends that the court committed reversible error in admitting expert testimony, as to the proper method of operating the machinery used in hoisting and lowering the cages.

The mine in which appellee worked was about 365 feet deep, and was reached by a perpendicular shaft. Above the surface of the ground and directly over the shaft was a tower, about forty feet in height. Two cages or elevators which were used to hoist coal and men, from and to lower men and material into the mine were operated up and down in the shaft. Near the top of the tower was a platform known as the top landing where the cages were loaded and unloaded and where the men would get on and off the cages, in going into and coming out of the mine. Each cage had two floors or decks. Coal and material were carried on the top deck and men on the lower deck. The cages lay east and west of each other and about six inches apart. They were enclosed on the east and west sides but were open on the north and south ends. Near the top of the tower were two pulley wheels. Each cage was suspended in the shaft by a steel cable. These cables passed over the pulley wheels and extended to the engine room, which pursuant to statutory requirement was about 125 feet from the tower and in a separate building. In the engine room the cables were wound around a drum about eight feet in diameter, in opposite directions, one from above and one from below. The drum was connected with the engine and driven by steam power. As it revolved one cage was brought up from the mine and the other lowered into it simultaneously. The engineer stood in front of the drum and controlled the movement of the cages by the use of three levers, the throttle, reverse and brake. The brake consisted of a steel band passing around

the drum was operated by one of the levers which applied steam power. In front of the engineer was a dial, required by statute, which indicated the position of the two cages in the shaft. In addition there was also a mark on the flange of the drum and also on the cables. From these marks and the dial the engineer could tell when the cages were approaching and when they reached the landings. At the bottom of the shaft the cages rested on timbers; and below these was the sump or well into which water drained and was pumped to the surface. When men were being hoisted they entered the cage from the ends, two abreast, and stood in two rows, six men in a row. At the top landing the men got on and off the south platform, getting on and off the cages. There were four automatic stops to hold the cages in position. These stops were about eighteen inches long and projected from the platform into the shaft. There were four stops for each cage, one at each corner. Each stop weighed about 125 pounds and fell out into the shaft by means of its own weight and, in addition, there was a strong spiral spring behind each stop to force it out into the shaft. These stops were so constructed that, as the cage came up, it pushed them out of its way. After the upper deck had passed, the stops would fall under the floor of this deck and were again pushed out of the way by the lower deck and after this deck had passed they would again fall automatically into the shaft and hold the cage at the landing. These stops were released by means of levers to allow the cage to descend. When carrying men the cage was brought from the bottom to the top landing in about forty seconds and in about twenty seconds when coal was being raised. There were four chains attached to the top of the cage, one at each corner, by means of which the cage was attached to the steel cable. There was also a fifth chain which operated

safety catches. These catches were so constructed and adjusted that they were held out so long as the cable was taut. The instant, however, the cable slackened these cables catches would stop the cage. They were designed to operate in case the cable broke. When the mine was being operated there were two men on the top landing known as the top cager and his assistant. One of these stood at each end of the cage on the top platform. In addition to other duties these men operated the two levers which released the stops. One lever was on the north side and one on the south side, and they operated together. There was also a bottom cager and his assistant employed at the bottom of the shaft who took empty cars off and put loaded ones on the cages. The bottom cager communicated with the top cager in reference to the moving of the cages up and down by signals which were given by means of a gong or bell. The top cager upon receiving the signal from the bottom that all was ready, would signal the engineer by means of a gong. The top cager also had a speaking tube running to the engineer's room.

There is a conflict in the testimony as to whether the cage in which appellee was being brought up from the mine stopped below or above the steps, some of the witnesses testifying that it stopped a few inches below while others testified that it stopped a few inches above the steps. Appellee was standing in the east row, the third man from the south. The first and second man in each row stepped off, and as appellee was in the act of doing so, the cage dropped three or four feet. The engineer saw by the revolving of the drum that the cage was dropping and immediately reversed his engine and brought the cage back up, and appellee

home.

The dog came also and a wheezing pipe tweaked to the mailman's tune.

"Hello, merry mistletoe mailman," answered a hand. The dog sniffed, wagging its tail. "Come in and have a hand or bell." The top slipped about more glaze to the corner of the eyes of the mailman. The bottom edges crumbled with the top melted to the corner of the mouth. The dog nudged itself and rose wagging mailman at the corner of the mouth. The bottom edges crumbled with the top melted to the corner of the eyes

~~was injured as above mentioned.~~

The engineer testified that after receiving the signal to hoist ~~the cage~~ he applied the power until the cage had ascended about 125 feet; ~~that he~~ then shut off ~~his~~ the power ~~and~~ permitted the cage to coast, or operate by momentum and the counterbalance of the other cage; that when ~~the indicator showed~~ the cage was at the top landing he ~~threw his~~ reverse ~~lever but did not apply any power,~~ and did not ~~put~~ on the brake; that he had operated this engine for a number of years, ~~and always~~ in this manner. He was called as a witness for ~~appellee~~, plaintiff, and testified on cross-examination that ~~in the~~ operation of the engine at the time in question, he used his best judgment to do it carefully. The witness Heilegist gave his opinion as an expert as to the proper manner in which the engine should be operated. He testified that he had operated this same engine ~~about~~ eight years before for ~~a period of~~ seven days, and afterwards for a short time; that he had worked for ~~the appellant~~ defendant twenty-three years and was still in its employ operating ~~the same kind of an~~ a similar though smaller engine, ~~although not quite so large; that he had been so employed for a number of years.~~ He was then permitted, over objection of ~~appellant~~ defendant, to ~~state that in~~ give his opinion if the stops were not under the floor of the cage, the reverse thrown, and the brake not applied the cage would drop, and that the proper method of operating the engine when men were being hoisted, after the cage had reached the top landing, the power shut off, the reverse thrown, would be to apply the brake to prevent the cage from dropping should the stops not work.

Appellant argues that it was reversible error to admit this testimony, for two reasons: (1) that the witness was not properly qualified to testify as an expert; (2)

that the question as to whether the brake should have been applied was not a subject for expert testimony, and the opinion of Heilegist was, therefore, an invasion of the province of the jury.

We think the witness was sufficiently qualified. In addition to his knowledge of the particular engine and his years of experience in operating the same and a similar engine, he was required under the statute to pass an examination showing that he had particular and technical knowledge of the engines and machinery used in operating coal mines.

As to the second reason, it clearly appears that the machinery used in the operation of the cage was complicated and not simple. We cannot say that the question whether the cage would drop without the application of the brake was a matter of common knowledge and therefore plain and open to the jury. In fact the top eager who had years of experience did not know this, and appellant's counsel state in their brief that the machinery was "more or less complicated". When the facts upon which opinions are founded cannot be made intelligible, opinions of witnesses may be received. Williams v. Morris, 237 Ill. 254. As said in the case of Schultz v. Burnwell Coal Company, 180 Ill. App. 693, "Mining is a business with which the ordinary individual is seldom familiar, and a jury of miners in the trial of this character of case is almost an impossibility." This is especially true in Cook County where there are no mines. It also appears from the record that appellant's counsel, on cross-examination of the engineer in charge of the engine at the time of the accident, and who was called as a witness for the appellee, asked the following question: "in doing the work that you then did, in hoisting that east car up to

that the executive or an employer who would have been
entitled not to a solution for mutual benefit, and the
solution of principle was, therefore, an invasion of the
province of the jury.

In truth the element was relatively unimportant. It
existed in the knowledge of the participant parties and his peers
of experience in computing the value of a similar engine, in the
relative degree the element of the unknown counted there
in the particular and technical knowledge of the engines and
machinery used in operating such plants.

As in the second reason, it clearly appears that the
testimony used in the operation of the mega was complicated
and not simple. In general and then the question changes the
duty merely from weighing the evidentiary of the issue for a
matter of common knowledge and intelligence given and open to the
jury. It does not lie within the power of [illegible] did not
know it'd, and appellant's counsel admit in their brief
that the testimony was "more or less conflicting". Some
slim there even were opinions are inserted [illegible] be read
intelligibly, opinions of witnesses may be received. Williams
v. Dentre. 104 Ill. 194. As said in the case of Chicago
& Rockford Road Company, 120 Ill. 490. 493. "Giving to
a question with which the evidence involved is subject
therein, was a jury of aliens in the trial of this cause
error to them be placed on impeachment." Title to personal
true is held exactly where title are to mines. It also
appears from the record that appellant's counsel, on cross-
examination of the engineer, [illegible] of the engine at the
time of the accident, and was not called as a witness for
the appellee, after the following questions: "In using the

to the top and lowering the other, did you use your best judgment and your best experience to do that carefully? A. I sure did." The witness had testified that he did not use the brake at the time of the accident, and the question asked by appellant's counsel clearly calls for his opinion as to whether he operated the engine in the proper manner. This was before the witness Heilegist had testified and shows clearly that appellant's counsel, at that time, considered the subject one on which opinion evidence was proper.

Furthermore, there were several counts in the declaration which charged negligence other than the failure to apply the brake and to which the testimony complained of did not apply, and the error, if any, is not therefore ground for reversal. In the case of Carney v. Marquette Coal Mining Co., 260 Ill. 220, the court say, p.227: "The objections made to the instructions, as well as to those rulings of the court upon the admission and exclusion of evidence which relate entirely to the statutory counts of the declaration, need not be considered, since in our opinion the judgment below may be sustained upon the common law counts, and in this view any error that may have intervened that only affects the right of recovery under the statutory counts is not material."

Appellant next contends that the judgment is excessive. It is argued in support of this contention that appellee was a coal miner earning from $2.00 to $2.25 per day when he worked; that he worked only when the mine was operated, which was about 150 to 200 days per year; that since the accident appellee, who is a young man, has taken a course in the high school; that he is now better equipped to earn more than if he had continued as a miner; that he has had a good recovery

and does not appear to have suffered after the wound healed; that at the legal rate of interest, the judgment would produce an income of about twice what appellee would have earned as a miner, and at his death the principal would be left to his descendants. Appellee suffered a very severe injury. It was necessary to amputate his left leg about six inches below the crotch and he testified that at the time of the trial, which was more than three years after the accident, he still suffered pain at times. The amount of damages for which recovery may be had depends upon the circumstances of the case, and is not a matter of mathematical computation. Appellee was a young man. The damages may be larger than would have been sustained a few years ago. We cannot, however be unmindful of the fact that the money value of life and health is appreciating and the earning capacity of money steadily diminishing during recent years. Without deciding whether the amount is larger than we would have made it had the responsibility been ours, we think it is not so excessive as to require interference on our part. The jury were properly instructed on the subject of damages, appellant has had a fair trial, and no complaint is made that the amount of the verdict was the result of passion and prejudice. The judgment of the Superior Court of Cook County will, therefore, be affirmed.

AFFIRMED.

276 - 21363.

MARY MURPHY, as Administratrix of the Estate of HUGH McGUIRE, Deceased,
Appellee,
vs.
CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 69

MR. JUSTICE GOODWIN delivered the opinion of the court.

By this appeal, the appellant seeks the reversal of a judgment against it for $8,500 recovered by appellee as administratrix, on account of the death of one Hugh McGuire. The ~~facts~~ material facts ~~to a determination of the appeal~~ are as follows:

Seventy-fifth street was, at the time of the accident, the southern terminus of ~~the appellant's~~ a Cottage Grove line. The north and south-bound tracks were connected by two cross-overs; ~~the cross-over from the north-bound track to the south-bound track was always kept open so that cars could be backed from the north-bound track upon the south-bound track without the turning of any switch;~~ In connection with the cross-over from the south-bound to the north-bound track there was a hand switch, ~~operated by hand;~~ cars coming from the north were sent ~~to the~~ south of this switch, and when an opportunity offered, were sent back of the switching point and ~~then~~ across to the north-bound track; ~~this brought them out in the order in which they were sent in. The evidence shows that~~ cars constantly accumulated at the terminal, and ~~that~~ in order to transfer them ~~to the north-bound track~~, and to arrange them so as to get them out in the order in which they arrived, there was ~~necessarily~~ a more or less constant backing and switch-

ing. ~~For the most part,~~ generally the work of transferring cars was done by the motormen and conductors, but at meal times it was usually done by two switchmen, and when necessary to get out on time, ~~apparently~~, the car crew assisted even at meal times. ~~In addition to the switchmen there~~ was also a supervisor or starter who had complete authority over the cars and ~~the~~ men at the terminus. Eichorn, ~~who held this position~~ the Starter at the time of the accident, had been in the employ of the company about twenty-four years.

~~On November 26, 1911, appellee's decedent, the motorman~~, ~~who was~~ a conductor, and one Schmidt, his motorman, arrived at the terminus some time after six ~~o'clock in the evening.~~ McGuire declared ate his supper on the car, while his motorman went to a lunch room. At six-thirty-seven P. M. ~~o'clock~~, when Eichorn saw McGuire declared near the switch, ~~the latter~~ declared asked ~~him what time it was~~ the time, and when told that it was six-thirty-seven, which was within a minute of his leaving time, remarked, "It takes a good man to get ready in a minute," and passed over to the north end of his car, which had just been switched from the south-bound to the north-bound track. There was only room on this track south of the switch for four cars, and ~~McGuire's~~ declared car made the fourth. It was equipped with two trolley poles, and he apparently immediately pulled down the one at the north end, preparatory to starting; almost instantly, he was struck and killed by another car which was being operated by one of the switching crew; this car followed McGuire's car closely, and was intended to be taken south on the south-bound track, but as the switch remained open, it crossed over to the north-bound track with the unfortunate result already stated. The switch in question was operated by a lever which, in its ordinary position, left the track

open so that south-bound cars would continue straight on south; when a car was to be switched to the north-bound track, the lever was raised, and when released, fell back into its original position. On the occasion in question, the starter had, himself, raised the handle of the lever for the purpose of permitting McGuire's car to cross over to the north-bound track, preparatory to leaving, but for his own greater ease or convenience, had slipped a block underneath the lever for the purpose of holding the switch in place.

The contentions presented on behalf of appellant which we think it necessary to examine are that McGuire was guilty of contributory negligence; that Eichorn was not negligent, nor was the switchman operating the car; that if either or both were negligent, both were the fellow servants of the deceased, and that the court erred in rulings on instructions.

The evidence, in our opinion, clearly sustains the jury in their conclusion that McGuire was not guilty of contributory negligence. On this point it is significant that his car filled the space between the switch and the remaining portion of the north-bound track: it was not, therefore, to be expected that another car would be switched over intentionally, and as he knew that the starter was near the switch, he had no reason to believe that a car would accidentally be switched across. The labored argument by which counsel for appellant attempt to show contributory negligence seems to us to be entirely without merit.

As to the second point, there was ample evidence from which the jury could properly conclude that Eichorn had been guilty of negligence. He had seen

McGuire's car pass over the switch, and he must have known that it filled the space on the north-bound track south of the switch. It was equally clear that if another car passed the switch, a collision would result which would threaten the safety of McGuire's train crew. A finding, therefore, that Kiehorn was negligent cannot in any way be said to be contrary to the manifest weight of the evidence.

Counsel for appellant further devote much space in their brief to an exposition of the fellow servant doctrine, and to a contention that in view of all the circumstances, McGuire and Kiehorn were fellow servants. The evidence, however, shows a street railway terminal at which cars were constantly being parked, backed up, switched over, and started. It is a matter of common knowledge and every day experience that such a constant shifting and switching is accompanied by danger, and for that reason requires intelligent supervision. It was manifestly for this reason, among others, that a person having authority to direct was placed in charge and given supervision. That Kiehorn had such authority is clearly shown by the rule that, "Starters will have control over the movement of cars at terminals, depots, and other points where such employes are stationed," and his own testimony that, "I had charge of those switchmen and they were required to do whatever I wanted them to do. I was in charge of all the men at that end of the line in and about the movement of the cars." The company clearly had a duty to see that the switching of the cars was properly supervised, and it had entrusted that duty to Kiehorn, who thus became a vice-principal. Counsel for appellant, however, have contended

with great ingenuity that as Eichorn himself raised the switch, his act was that of a switchman and fellow servant. It may well be that a vice-principal may, in a given case, so entirely divest himself of his character as vice-principal as to become, for the time being, a fellow servant in such a sense that an accident to a fellow servant resulting from his negligence will not be actionable; such, however, is not the case at bar. Appellant's duty of supervision was a continuing one, and consequently Eichorn's supervisory and directory duty was one of which he could not divest himself even for a moment. It was immaterial whether he or some one else propped open the switch, for as soon as McGuire's car had passed over and filled the space on the north-bound track, it was his duty to use all reasonable care to see that no other car was switched across. There was evidence from which the jury could have inferred negligence on Eichorn's part in failing to remove the block or failing to see that it was removed the instant McGuire's car passed over, and there was certainly ample evidence from which the jury could have inferred that he was negligent in permitting the second car to pass the switch, in view of all the circumstances in the case. On this point, we have examined the cases cited and argument made by counsel for appellant with great care, and are clearly of the opinion that there is no substance to the claim that Eichorn and McGuire were fellow servants or that the facts in this case bring it within either the spirit or the letter of the fellow servant rule.

Counsel have devoted some space to the contention that McGuire, at the time he pulled down the north trolley pole, was not acting within the scope of his duty.

We do not think this contention merits serious consideration. The evidence does not attempt rigidly to define and limit the duties of conductor and motorman. From the nature of the case, moreover, their duties are not subject to absolute definition and division. The successful prosecution of the company's business demands the punctual dispatch of cars from the terminus, and it is obviously the duty of the train crew to co-operate to that end. When, therefore, a conductor whose car has just been switched into position, finds that it is within a minute of leaving time, readjusts the trolley pole for the purpose of getting his car started on the instant, it seems impossible ~~xxxxx~~ to say that he is not performing an act within the scope of his duties. We are, therefore, of the opinion that the evidence fully justified the jury in finding that McGuire was killed while acting within the scope of his duties, that he was acting with due care for his own safety, and that the accident happened as the result of negligence on the part of an employe of the appellant, who was not McGuire's fellow servant. In this view of the case it is unnecessary to consider the question of the negligence of the switchman operating the car, and that of the retention in employment, by appellant, of an incompetent servant.

Appellant's counsel further contend that it was error for the court to give plaintiff's instruction number twelve, which was as follows:

> "The court instructs the jury that where a master confers authority upon one of his employes to take charge and control of a certain class of workmen, in carrying on some particular branch of his business, such employe, in governing and directing the movements of the men under his charge, with respect to that branch of the business is the direct representative of the master, and is not a mere fellow-servant; and all the

impossible

> commands given by him within the scope of his authority are, in law, the commands of the master, and if he is guilty of a negligent and unskillful exercise of his power and authority over the men under his charge, it is in law the same as though the master itself was guilty of such conduct."

Counsel contend that there is no scintilla of evidence that Eichorn, at the time of the accident, was governing or directing the movements of any men. We are unable to agree with this contention; he was by rule given authority over the men; the man operating the car which caused McGuire's death was under his charge and subject to his directions. They further complain of the insertion of the words, "all the commands given by him within the scope of his authority are, in law, the commands of the master, and if he is guilty of a negligent and unskillful exercise of his power and authority over the men under his charge, it is in law the same as though the master itself was guilty of such conduct." The reference to commands could not have been taken by the jury to have referred to directions given in this case, and the statement that the commands given by him are, in law, the commands of the master, is merely to illustrate to the jury how closely identified the master is with his vice-principal. The statement that, "if he is guilty of a negligent and unskillful exercise of his power and authority over the men under his charge," is obviously proper, in view of appellee's contention that Eichorn had been guilty of a negligent and unskillful exercise of his power and authority in not warning the switchman operating the car which killed McGuire. The contention that the instruction directs a verdict if the jury find that such direct representative of the master was guilty of a negligent exercise of his power and authority, is made with great

ingenuity, but is palpably unsound. The instruction does not profess to direct a verdict, and does not do so impliedly; its sole purpose and effect is to say that the negligence of a direct representative of the master is, in law, equivalent to the negligence of the master himself.

Counsel for appellant also object to plaintiff's instruction number thirteen, which was as follows:

> "The court instructs the jury that to constitute servants of the same master, fellow-servants, it is not enough that they are engaged in doing parts of the same work, or in the promotion of the same enterprise carried on by the master, not requiring co-operation or bringing them together, or in such relations as that they may have an influence upon each other, but it is essential that at the time it is claimed such relations exist they shall be directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into such habitual association that they may have the opportunity and power to exercise an influence upon each other promotive of proper caution for their personal safety."

While the first or negative part of this instruction may be awkwardly worded and difficult to understand, as appellant's counsel contend, it certainly gives no erroneous or misleading direction or impression, while the latter part, which is the vital and directing portion of the instruction, does state with clearness the alternative conditions which must exist in order to constitute servants of the same master, fellow servants.

Plaintiff's instruction number eleven is also criticised. It was as follows:

> "The court instructs the jury that when it is said in these instructions that the deceased was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent person, situated as he was, both before and at the time of the injury, would have exercised for his or her own safety."

The criticism is based on the ground that "it assumes that an ordinarily prudent person would be situated as deceased was, both before and at the time of the injury." This contention seems to us far fetched. The plain import of the instruction, which has been repeatedly approved by our Supreme Court, is to require the exercise of ordinary care, both before and at the time of the injury.

Counsel for appellant complain because the court refused to give the following instruction:

> "You are instructed that in this case it is not charged or claimed by the plaintiff in the declaration that the use of a stick or block of wood for the purpose of assisting in holding or blocking up of the lever switch-handle by the starter, Eichorn, was negligent, and no recovery can be had in this case by the plaintiff against the defendant because a wooden block or prop was used in holding or blocking up the lever switch-handle."

The giving of this instruction would certainly have been likely to create an erroneous impression on the jurors' minds. The contention of appellee was that the starter Eichorn was negligent: one incident of his conduct was the propping up of the lever by the use of a wooden block or prop, and the effect of the instruction in the form asked might well be to cause the jury to eliminate that fact in considering the question of his negligence.

Counsel for appellant further contend that it was reversible error for the court to refuse to give certain instructions directing the jury to find the defendant not guilty as to certain counts which they contend were not supported by the evidence. The law of this State, however, is that the refusal so to instruct a jury is not reversible error if the evidence is sufficient to sustain the allegations contained in any one valid count. As

already indicated, we are of the opinion that the evidence amply sustains the counts of the declaration predicated on the negligence of Hichorn.

For the reasons given, the judgment of the Superior Court is affirmed.

AFFIRMED.

608 - 22006

MYRON A. MARTIN, Administrator of the Estate of ALICE LONG, Deceased,
Appellee,

vs.

CLARENCE T. COE and SAMUEL A. COE,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

202 I.A. 75

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellee, as administrator of the estate of Alice Long, deceased, filed his bill in the Circuit Court to set aside a certain instrument executed by his decedent, on the ground that she did not have capacity to know either the property disposed of, or the object of her bounty. George A. Long, husband of the decedent, who was made a party defendant, answered admitting the allegations of the bill, and filed a cross bill seeking affirmative relief; first, on the ground that the property conveyed by the instrument, was the joint property of himself and the decedent, and second, that he had an interest in the cash disposed of to the extent of $800.00, and in certain notes to the extent of some $1,400.00. The evidence disclosed that Alice Long and George A. Long were married in 1871 and had resided in this city for the past ten years; the husband worked at his trade as carpenter and joiner until a former injury to the base of his spine so affected his optic nerves that he became blind; the injury also resulted in the partial paralysis of his legs, and his consequent inability to walk without crutches. He had been in this helpless condition for about three years at the time of his wife's death which occurred June 27, 1914. It had been

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BY. JOSEPH GOODWIN maintains the opinion of the

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the husband's habit for some twenty-five years or more to turn his earnings over to his wife, who kept an account in her own name; in this account were also deposited moneys received by her from her father's and sister's estates. The account was changed to the joint account of the husband and wife. Long testified that this was done because of the fact that his wife and he had known a man and wife who placed their earnings amounting to about $2,000 in a bank in the wife's name and that when the wife died, the husband had been obliged to wait two years before he could draw out any of it. The Longs, therefore had arranged their account so that either could draw a check and both had access to the safety deposit vault.

It appeared that in November, 1912, when Alice Long was about to undergo an operation for a cancer, she executed deeds conveying apparently all her real estate to her husband. Some time in May, 1914, her health began to fail, and in June a paralytic stroke brought her under the constant care of nurses. She continued to lose strength very rapidly up to June 27th, when she died. Some time prior to May 20th she gave authority to her friend Mrs. R. V. Bane to draw checks against the joint account of herself and husband. Subsequently, a card of identification containing the signatures of Alice Long and Mrs. Bane was lodged with the bank. On May 20th, Alice Long sent Mrs. Bane to the bank with a note reading, "Please admit the bearer, my trusted friend, to my box, Mrs. R. V. Bane. (Signed) Alice Long. Box 118." Mrs. Bane on that day found that the box contained the following notes; Samuel A. Coe, $3,200, Clarence T. Coe, $500, $300, $100, James Chester Coe $100, Sarah P. Robertson, $549, $1300 in currency, and

some jewelry. George Long drew checks upon the account during the months of May and June, and on June 9th there remained in the joint account the sum of $3780.90. On the morning of June 9th, the defendant C. T. Coe, a brother of Alice Long's, called on her for not more than ten minutes; he did not see George A. Long, who was on the back porch at the time, and upon leaving, went to the home of Mrs. Bane, who proceeded with him to the bank, where he drafted in lead pencil the following memorandum:

> "To Whom It May Concern:
> This is to certify that I have this day given of my own free will and voluntary act, to my brothers, Samuel A. Coe and Clarence T. Coe, all of my personal property such as money, mortgages and notes, Provided: the same to be used as follows: The income from same and as much of the principal as may become necessary to be used for the support of myself and my husband, George Long, so long as either of us may live, the balance, if any, to belong to my brothers, as named above, for their own use.
> Signed."

He caused this memorandum to be typewritten, and put all the contents in a safety deposit vault in a bundle, with the exception of the notes, which were retained by Mrs. Bane. They then returned to the home of George A. and Alice Long, but stopped on the way to request the complainant, Dr. Myron A. Martin, to go with them and witness a paper about to be signed. At the suggestion of Dr. Martin and Mr. Long the typewritten paper was altered by inserting the word "children" after the words "my brothers." In this form it was signed by Alice Long and witnessed by Dr. Martin (the appellee) and Mrs. Bane.

The chancellor, upon evidence adduced in open court, found that at the time Alice Long executed the paper she was not in such possession of her faculties and of such

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sound mind and memory as to enable her to comprehend and understand the character and effect of the instrument which was then being presented to her, and decreed that appellee, as administrator, was entitled to recover from the appellants S. A. Coe and C. T. Coe the money and effects which the instrument purported to transfer to them, and also decreed that George A. Long was entitled to recover of them the sum of $2,200 less any sums which they had advanced to him, and further that his receipt should be accepted by the administrator prior to the payment of any moneys to him.

The defendants S. A. and C. T. Coe took this appeal but no appeal was prayed by the defendant and cross complainant Long, who had set up a claim to the property as a surviving joint tenant, which was clearly overruled by the chancellor's finding that right to possession of the property in question was in the administrator. The sole questions for determination, therefore, are, as to whether the evidence supports the chancellor's finding that the instrument in question was executed at a time when Alice Long was not in such possession of her faculties and of such sound mind and memory as to enable her to comprehend and understand the character and effect of the instrument, and whether it supported his further finding that George A. Long was entitled to recover $2,200. The finding of the learned chancellor in regard to the decedent's mental capacity rests upon the testimony of the appellee and George A. Long, who were present at the time the instrument was executed, Dr. Driscoll, who saw Alice Long about six weeks before her death and again about two weeks before her death, one Maria Lynch, a nurse, who testified in regard to Alice Long's condition on the day in question, one Mrs. Sophia Erwin testified that in March prior to her death, Mrs.

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Long had stated that she would not leave any property to her people, and that it was all to go to Mr. Long, a Miss Sophia Erwin, who testified that Alice Long had told her that right after she cameback from the hospital she made a new will, leaving her property to Mr. Long, a Mrs. Lemmon, who testified that she saw Mrs. Long shortly before she went to the hospital in 1912, and that when she was told that her personal property would go to her husband and half of her real estate would also go to him, she said, "Well, I don't care. Let it go at that," and a Mrs. Lovina Fiske, who said that Mrs. Long had told her, apparently in 1912, that her brothers should not have a dollar of her money. The fact that when the decedent was about to undergo a serious operation she deeded her real estate to her husband, is also relied upon as showing an intention to have her entire property go to her husband.

Dr. Martin's testimony was that he had attended Mrs. Long more or less for eight or ten years, that she had been operated on for cancer of the breast in November, 1912; that June 9th, 1912, he went with Mr. Coe, at the latter's request, to Mrs. Long's residence, and found her lying on a lounge in a bay window, in a dying condition; that she looked very stupid, listless, very much exhausted and emaciated and did not recognize him; she permitted him to sit at the foot of the lounge where she should have known that he could see her person, which was exposed; she did not tell any one to pull down her night gown. The paper in question was read to her; Mr. Long came into the room; they got a book, placed it on her lap, and she was able to draw up only the right leg, as she was paralyzed on her left side; before she signed it Mr. Long who was standing behind the ladies, asked her in a loud voice if she had not always said that she did not want any of her

money to go to her brothers, and she said, in a mumbling way, that she thought that was what it said, that the money went to the children and not to her brothers. Mr. Long ordered Mr. Coe out of the house, and said that if he could see he would get a gun and shoot him. After this conversation the paper was changed so that the money would go to the children, and she then made an attempt to sign her name; the pen was placed in her hand and fell on the floor; the pen was put back in her hand, and Mr. Coe said to her, "Make and 'A', Alice, make an 'A!" and upon his direction, she made some marks on the paper which he attempted to correct, but the witness, Dr. Martin, advised him not to do so. He thought C. T. Coe's hand was supporting here all the time; he did not think the woman realized what she was doing, and based his opinion on the fact that she should have protected her person, and also the fact that when her husband said she did not know what she was doing, she did not offer any objection, but remained listless and indifferent. He also said Mrs. Long had a cross-paralysis, and that this produces stupor and lack of mental ability, that there was a failure of memory, and that she was very much emaciated; that as soon as the paper was signed, Mr. Coe sat down at a table and made out a check for the large amount, signed his name, and then asked Mrs. Bane to also sign it; that Coe afterwards signed his name to the blank checks in the book and directed Mrs. Bane to fill in the blank checks for such amounts as might be needed for the expenses of the house. The witness identified the check for $3,768.40 as the one Coe signed. On cross-examination he said that the people in the room were Mrs. Long, Mr. Coe, Mrs. Bane, Mrs. Blakesley, (a nurse) Mrs. Lynch (a nurse) himself and Mr. Long; they were there fifteen or

[a nurse] himself one day. [and] they were there fifteen or twenty. It. One. Dune. Sire. Intensely. (a nurse) him. [from] accustomed to only that the people in the room were Moo. the check for $1,788.40 on the Sun One eleven. On accommanded for the ordinance of the house. Ten witness identified hands to fill in the blank console for each mountain an night be his name to the Black Console on the lords and dismissed him. Make to plan with it; that one aforementioned aligned out a charge for the large amount. signed his name, now sing on the Dodge and signed. Mr. Cue out down at a table and each of country, and that she was very much associated; that as soon started our lack of mental ability, that there was a Dolphin Moo. body had a green-monolysis, and that this previous line, but previously Illinois and Indiana. He also said not know what she was doing, else all not offer any objection. Person, and as the case that when Jan Dunbone said the Rite Opinion on the fact that she should have threatened Dan Pat think the woman involved since she was dying, and leave E. Doe's hand was supporting here all the time; he did reference, Dr. Smarts, explored Rite not to do so. He thought Visked back on 'A' was down his Attention, the young Dane Jungle in her hand, Dan Mr. Cue sale to Dan, "Duke and 'A', Picture in her hand was Fall on the Floor; the Dan was had one time would we attempts be also Dan Dune; the Dan was Judge her thought so that the Jungle hands Up in the Airplane. really Pat a Dan had Check Out. After this encountering the Jungle. Up. Doe, Dune, Sire. Intensely. (a nurse) him. Dune

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twenty minutes; when the paper was first prepared it did not have the word "children" in it; he signed the paper as a witness, but he was not assenting to everything that was done; he did not attempt to dissuade Alice Long from signing it, but kept just as quiet as he could, and did not say a word. He, himself, suggested putting in the word "children;" he said in an undertone to Mr. Coe, who was near him, "Why don't you let it go to the children, and you will have control of it, that is all you want." He then went to Mr. Long, who was on the back porch, and when he came back it had been changed.

We are unable to see how the testimony of this witness tends to support a finding that Alice Long was not in such possession of her faculties and of such sound mind and memory as to enable her to comprehend and understand the character and effect of the instrument executed. It very clearly appears that when her husband, who came into the room before the paper was signed, explained to her that the instrument, as originally drafted, did not carry out her intention, she indicated that it was her intention that the property should go to her brother's children, and said she thought that was what this document said and she did not sign it until it was changed in such a way as to express that intention. Dr. Martin's testimony, moreover, places him in the very unenviable light of aiding the appellant C. T. Coe in securing the execution of the instrument, signing it as a witness, and afterwards saying that the person making it did not know what she was doing. From his own testimony it is very plain that Mrs. Long did not wish or intend to sign the instrument in the form originally drafted, and that he, himself, suggested the change that led her to sign it. There is nothing in his evidence that warrants an inference that she would have signed it if the change which he slyly

suggested had not been made.

George A. Long's testimony, as far as it relates to the question of his wife's mental capacity, is to the effect that he was sitting on the back porch when Dr. Martin and Mr. Coe came up the stairway, that somebody came out and said, "You want to come in, they are going to sign a paper," that he went in and stood at the head of the lounge and heard the paper read, and said, "I object to that; that is not the way my wife intended to have things. You told me your brothers were never going to have any of your money, and you were going to give some, or you made me promise to give some money to some of the children;" that she then said, "That is what I mean;" he then replied, "All right, I didn't understand it that way." He heard them say, "Here is the pen, Alice, and after a few moments of silence, "Make an 'A' Alice, make an 'A', make an 'l', make an 'i;'" that somebody then said, "She can't hold her pen," and C. T. Coe replied, "She doesn't have to hold it; I will write it and she can touch the pen and that will make it legal." He then relates some talk about the notes.

It will be seen from his own testimony that Mr. Long did not, in any way, protest against the signing of the document in the form in which it was finally executed; he was there, he heard it read, he knew the alteration that had been made, and he was the party most vitally interested. The testimony of the other witnesses called on behalf of the complainant, which has been referred to, in our opinion, throws no light upon the question of Mrs. Long's mental capacity. On the other side, one Ford D. Porter, traffic manager for the Shippers' Traffic Association, testified that he met Dr. Martin at Mrs. Long's funeral, and heard him say that Mrs.

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'J,' make an 'i';" that somebody Elm sale, "the can't [illegible]
Richards el Alamos, "make an 'A' Alice, make an 'E,' make an

Long was in a very good condition; that he never had seen a woman with a better constitution, and, as Mr. Porter remembers it, he said that her mind was clear. C. T. Coe testified that he read the paper as it was originally drafted; that Long entered the room and made a little scene, saying that Alice Long was not ever going to give anything to her brothers, and it was to go to the children; he did not remember all that was said, but thought he made some remark about being a little out of temper, and Dr. Martin spoke up and said, in his peculiar way, "George, George, you go out of the room. You are irritating your wife and making her nervous. Now, you go out of the room." He testified that Mrs. Long then said, "I don't want it to go to you and Gus," and he asked, "Why not?" to which she replied, "Because I want it to go to the children." He said, "If it goes to my brother Gus and I, it will eventually go to the children," and she said "I know that, but you have got three children and Gus has got eight, and I want it to go equally." Dr. Martin then suggested that he put in the word "children," and when this was done, Coe said, "now, Alice, we have changed it this way," (Reading it to her again) and she said, "Yes, that is the way I want it." He then testified in regard to the distribution of some personal property. The wife of S. A. Coe testified that Mrs. Long told her she wanted the property fixed so it would go back to her own family, but her husband did not want to do it. There was, moreover, one witness to the execution of the instrument, to whose testimony great weight should be attached; she was Mrs. Bane who had known the Longs for sixteen or seventeen years, and had been intimately acquainted with them. It was to this trusted friend that Mrs. Long gave access to her safety deposit box and funds in the bank.

She testified that on June 9th, when Mr. Coe came in with Dr. Martin, Mr. Coe said to his sister, "Alice, I have that paper ready for you to sign;" that Mrs. Long was propped up to sign it, the paper was read, and Mr. Long objected to it; that he was nervous, excited and displeased with it, and told her he did not think she would do that way, or something to that effect, and that she had never told him a lie, or something like that; that Mrs. Long was a very sick woman; that after the paper was read to her, Mr. Long told her that she did not want it that way, and he spoke of the children and Mrs. Long said she thought it was that way; that it was then changed and re-read and then signed by her; that at the time, she said, "Oh, George," several times, and remarked that neither of them would need it long, and that he would have his support; Mr. Coe stayed a short time after the paper was signed; Mrs. Long told Mr. Coe, after the paper was signed, there were some furs she wanted him to have for his wife, and he went and got them and showed them to her and she said, "Yes", and that there was another piece; they were in a pillow case and he took them away in that; Mr. Coe had one watch in his pocket; Mrs. Long said, "Get the other one;" Mrs. Bane then got the other watch and she told him that was for his wife, Helen, and the other for John Coe's wife. She testified that after Mrs. Long had signed the paper she said, "Can Mrs. Bane get money now?" and Mr. Coe said, "Yes, I will fix that up all right." She did not remember the number of them, but said she filled them out and signed them. She saw Mrs. Long every day during her last illness; they made no arrangement with her for compensation for her services; she never told Dr. Martin or anybody else that Mrs. Long promised her $500; she was pre-

sent in court when Dr. Martin testified on that point. She remembered a conversation with Mr. Long on his front porch, one evening soon after Mrs. Long's death, when she found there was going to be trouble. During the time when the conversation took place in regard to furs, watches, etc., Mrs. Long's speech was thick, but Mrs. Bane understood what she said. She first spoke about the furs, and told her to get the other watch. Mrs. Bane did not know that she was much of a judge, but said that she certainly never would have signed the paper (as a witness) if she had not thought that Mrs. Long was capable of signing it herself; that was her candid opinion at the time; she heard Dr. Martin say that he thought Mrs. Long's mental condition was unusual.

One Cecil George Kellogg testified that he heard Dr. Martin, the day of Mrs. Long's funeral, speak of how remarkable it was that she held out the number of days, due to her will-power; that Dr. Martin spoke of her mind as being as "clear as a bell." This witness was a son-in-law of S. A. Coe.

Dr. Martin, on cross examination, said, in rebuttal, "No matter what I told them, it was not under oath and her mind was not clear. That woman never was clear-minded. After she began to fail along in May, or the spring of 1914, I would not consider anything that she did, whether it was legal or illegal, as holding her responsible for it; and I would have objected to what she did at that time, if her husband had not objected. I was asked over there to be a witness, and not to fight, and I am sorry I was a witness in this case. If I said that her mind was clear it was only to pacify the people that were picking on to me and trying to get information, but I was

wise to them on that. I may have encouraged them in all kinds of ways, but I will say that the woman did try to live."

After a carefully scrutiny of the testimony, we are constrained to say that we are unable to concur in the finding of the learned chancellor in regard to Mrs. Long's condition. The conduct of Dr. Martin at the time the instrument was executed, and his own account of what occurred, is entirely inconsistent with the supposition that he then believed that she lacked mental capacity to know the character and effect of the instrument executed. The failure of George Long, the party most interested, to protest against the execution of the instrument after it had been changed, is very persuasive of a belief that he did not, at that time, consider that his wife lacked the necessary mental capacity to execute the instrument. Nor do we think that there is anything in the testimony of either of these witnesses in regard to anything that was said or done at the time the instrument was executed which indicates that Mrs. Long did not fully understand the character of the instrument she was signing, or that she did not know the natural objects of her bounty. On the other hand we have the very clear testimony of a disinterested witness, for many years the friend of both Mrs. Long and her husband, to the effect that she certainly believed that Mrs. Long knew what she was doing. Mr. Long, himself, says of this witness, "She was a good, kind friend, and she had known my wife a good many years, and they were intimate." Her statements in regard to the conversation which occurred in connection with the execution of the instrument and the directions given Mrs. Long in regard to her property, in our opinion, show the latter to have been clearly in such possession of her mental faculties as

of water, but I will only fight the water gin rub to ice."

Plato's masculinity parading of the confident, as the

to enable her to know the character and effect of the instrument she was signing and the natural objects of her bounty. We have made this full summary and analysis of the testimony for the reason that the findings of so able and experienced a chancellor, made upon evidence received in open court, ought not lightly to be disturbed.

Counsel for appellee further contends that the instrument was ineffective because Alice Long drew no check on the bank and made no delivery of the contents of the safety deposit box. Centainly the decree cannot be supported upon any such ground. The bill sought to have an instrument set aside upon the ground that the maker was "without capacity to know either the property disposed of or the object of her bounty." It cannot be supported upon grounds neither relied upon nor put in issue. Moreover, it appears from the evidence that the contents of the safety deposit box had been turned over to C. T. Coe, one of the trustees named in the instrument, prior to its execution, and that immediately upon its execution Mrs. Bane, who was authorized to draw checks against Mrs. Long's bank account, drew a check in favor of said trustee for the amount of the balance on deposit. In view of the fact that the uncontradicted evidence shows that Mrs. Long had given Mrs. Bane full power over her bank account and access to her safety deposit box, and that Mrs. Bane was acting for her, it cannot be disputed that she had full power to make delivery of the property in accordance with the terms of the instrument which Mrs. Long had signed.

Counsel makes the further contention that this property was the joint property of the husband and wife, and

to modify but to take the character and effect of the instru-
ment she was signing and the present estimate of her income.
We have only this fact necessarily and completely of the instrument
for the issues that the holder of an sale can substituted
a depositor, once made effective retroactive to open count.

Counsel for objecting further contends that the
instrument was fraudulent because title long drew no
check on the bank nor made no deposit of the contents of
the safety deposit box. Conversely the future interest be sub-
jected upon any such contract. It will suffice to have an
instrument not calling upon the grantee that can modify any
element necessary to alter either the property disposed of
or the extent of the power." It cannot be maintained upon
grounds material relied upon not set in issue. Moreover,
it appears from the evidence that the contents of the
safety deposit box had been turned over to G. T. Doe, one
of the trustees named in the instrument, prior to its exe-
cution, and that immediately upon its execution Mr. Bate,
who was authorized to draw checks against Mrs. Long's bank
account, drew a check in favor of said trustee for the
amount of the balance on deposit. In view of the fact that
the uncontradicted evidence shows that Mrs. Long had given
the. Bank full power over her bank account and access to her
safety deposit box, and that Mrs. Bate was acting for her,
it seemed to disclose that she had full power to make delivery
of the property in controversy with the issue of the instru-
ment this fact. Long had rights.

Counsel make the further contention that this
property was the joint property of the husband and wife,

and was not subject to disposition by the latter alone. It is a sufficient answer to this to say that the appellee is the administrator, and as such obtained a decree finding that he is entitled to the property as the property of his decedent; he cannot, of course, now be heard to say that it was not the property of the decedent, but the joint property of the decedent and her husband. The decree found that George A. Long was entitled to recover $2,200 as his separate property, and the manner in which Long was given relief was undoubtedly based upon the practical situation created by the other findings of the decree, and would not be objectionable if the other relief granted were not to be disturbed; but as only $800 of Long's interest was in cash, while the remaining $1,400 represented his interest in certain notes, he is entitled as to the latter only to a decree finding his interest in the specific notes, and that he be paid out of the proceeds when collected. Counsel for appellants contend that the finding in the decree in favor of Long is not supported by the evidence, but we do not think this contention is borne out by the record, for it amply appears from the testimony of Long that he had an interest to the extent of $800 in a note that was paid June 5th, prior to his wife's death, and interest in another note to the extent of $200 and that nearly all of two amounts, one of $800 and one of $1,200, which went into a third note was his money. Upon this point there was no countervailing proof offered. The decree of the Circuit Court is therefore reversed and the cause remanded with directions to dismiss appellee's bill and to enter a decree granting relief to cross-complainant Long in harmony with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

22740

~~Filed~~ - 22740.

EVANGELICAL LUTHERAN ST. MATTHEWS CONGREGATION OF LEMONT, ILLINOIS, Appellee,	INTERLOCUTORY ORDER.
vs.	APPEAL FROM
ROLLAND E. BERHARDS, sued as REV. E. BERHARD, Appellant.	SUPERIOR COURT, COOK COUNTY.

202 I.A. 87

MR. JUSTICE GOODWIN delivered the opinion of the court.

This interlocutory appeal was taken to secure the reversal of an order directing the issuing of a writ of injunction, "as prayed in said bill," and ordering "that the said defendants and each of them be and the same are hereby enjoined from audibly performing any religious services in the cemetery of the complainant until further ordered by this court." The petitioners allege that they are trustees of the Evangelical congregation named in the bill, but do not allege that they constitute all the trustees of said congregation or a majority of them. It is obvious that a minority of the trustees have no power to represent the rights of their cestui que trust in a bill in equity without showing good and sufficient reasons for permitting them to do so: therefore, it is clear that as the petitioners are not shown to constitute a majority of the trustees of the congregation, they are not entitled to relief in their official capacity. The bill sets up the ownership by the congregation of a cemetery; that it established the rules by which permits were given for burial; that it passed a rule which prohibited any one not affiliated with its denomination from praying aloud or reading aloud from a ritual, or in any other way officiating at an interment in the cemetery; that one Thomelen, who had been a member of the congregation, received a permit to bury his family in a certain plot, under the rules and regulations of said cemetery;

that he had died, and that his relatives intended that the defendant, a Methodist minister, should officiate; that the defendant had at other times officiated against their objection, and trespassed upon the burying ground and performed and enunciated openly and audibly the ceremonies of his particular creed; that the congregation had served notice upon him not to do so; that he had evidenced a determination to disregard the rule; that petitioner had no means of enforcing control over the cemetery or preventing the desecration of the cemetery by the invasion of the defendant, except by the injunctional order of the court, and states that "your petitioner shows that irreparable damage will be done unless said injunction is issued without notice and without bond." It prayed that an injunctional order be issued without notice and without bond, as above prayed, and that upon hearing the temporary injunction be decreed to be permanent.

In the first place, there is no statement, in this bill, of facts from which the court can conclude that the permit issued to the deceased was not sufficient to give a right of burial without restriction as to its kind or character. The statement that the permit was subject to the rules and regulations of the congregation is a conclusion of law, and gives no information as to the character of the permit or the nature of the conditions attached to it. To authorize a court of chancery to act for the protection of a property right, that property right and its invasion must be shown by facts properly alleged, and not by a mere statement of conclusions. Again, there is no showing of such damage as will entitle a complainant to the aid of a court of equity. In Rabinovich

v. Smith, 180 Ill. App. 408, this court, speaking through Mr. Justice Hall, said, at page 412:

> "The principle which lies at the foundation of the exercise of the injunctive process of the court is the inability of the law to afford adequate redress. It is not sufficient to entitle the complainant to this relief that he allege irreparable damage. He must aver facts from which, if true, the court can fairly draw that conclusion."

There are no facts set forth in this bill from which the court is able to see that irreparable damage would result from the performance of burial service intended. It may well be that such a showing could be made, but it has not been made here.

It also appears that nowhere in the bill does there appear a prayer for injunctional relief. There is a prayer "that a temporary injunction may be issued without notice and without bond as above prayed," but a careful reading of the bill fails to show that any injunction had been prayed for, nor does it show any prayer for any other relief, specific or general.

For the reasons stated, we are of the opinion that the bill is fatally defective and that the order for an injunction was improperly issued. The order of injunction is reversed.

ORDER REVERSED.

385 - 21369

LA SALLE EXTENSION UNIVERSITY, Appellee,

vs.

HAMILTON COLLEGE OF LAW, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 88

MR. JUSTICE TAYLOR delivered the opinion of the court.

The La Salle Extension University, a corporation, brought suit in the Municipal Court of Chicago against the Hamilton College of Law, a corporation, on four promissory notes and recovered a judgment for $2099.63. Appellee's claim is for the four promissory notes, which are as follows:

> "One note dated June 23, 1910, payable September 10, 1911, to the order of Cree Publishing Company for the sum of Five Hundred and Seventy-two Dollars and Fifty Cents ($572.50), at Chicago, Illinois, with interest thereon at the rate of five per cent (5%) per annum, from September 10, 1911, which note was duly endorsed and delivered before maturity by said Cree Publishing Company to the plaintiff herein.
>
> One note dated June 23, 1910, payable May 10, 1911, to the order of Cree Publishing Company for the sum of Five Hundred and Seventy-two Dollars and Fifty Cents ($572.50), at Chicago, Illinois, with interest thereon at the rate of five per cent (5%) per annum from May 10, 1911, which note was duly endorsed and delivered before maturity by said Cree Publishing Company to the plaintiff herein.
>
> One note dated January 10, 1911, payable April 10, 1911, to the order of said plaintiff for the sum of Five Hundred and Sixty-two Dollars and Fifty Cents ($562.50), with interest thereon at the rate of six per cent (6%) per annum from date.
>
> One note dated March 17, 1911, payable May 17, 1911, to the order of said plaintiff for the sum of Eighty-one Dollars and Twenty-five Cents ($81.25), with interest thereon at the rate of six per cent (6%) per annum from date."

The appellant admitted the execution and delivery of the notes but claimed that they were given "in compliance with

BY DEVIN-CONSOLIDATED CORPORATION,

Complainant,

vs.

REMINGTON ARMS COMPANY, INC.,

Respondent.

Docket No. 8288

Order Dismissing Complaint

On May 15, 1933, the Devin-Consolidated Corporation filed its complaint herein, charging that the respondent Remington Arms Company, Inc., was engaged in the practice of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act.

Thereafter, on June 10, 1933, the respondent filed its answer, admitting certain of the allegations of the complaint, but denying that it had been guilty of any unfair methods of competition in commerce.

Pursuant to notice duly served upon the parties, hearings were held before an examiner of the Commission at the offices of the Commission in Washington, D. C., on June 20, 1933, and at Chicago, Illinois, on July 5, 1933, at which testimony and evidence were introduced in support of the allegations of the complaint and in opposition thereto.

On October 15, 1933, the respondent filed a motion to dismiss the complaint herein, on the ground that the Commission is without jurisdiction in the premises, for the reason that the alleged unfair methods of competition charged in the complaint are not methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Upon consideration of said motion, it is ordered that the same be, and it hereby is, granted.

By the Commission.

(SEAL)

OTIS B. JOHNSON,

Secretary.

the terms of an executory contract" and that there was a failure of consideration.

In May 1910, the appellant entered into negotiations with the Cree Publishing Company, a corporation, to buy 1,000 sets of the Putney Law Library (when manufactured and delivered to be called "Hamilton College of Law") for use in socalled extension work by the appellant and to cost $18 per set.

In order that the Cree Publishing Company might have authority to make such a contract with the appellant, it was necessary for it, the Cree Publishing Company, to make terms with De Bower & Chapline who owned the exclusive rights of sale in certain territory.

Accordingly the Cree Publishing Company took up the matter with De Bower & Chapline and it was agreed between them that De Bower & Chapline would release certain territory and that the Cree Publishing Company would conpensate them for that release. The compensation agreed upon was half of the profits made by the Cree Publishing Company on each set of books.

On May 23, 1910 the Cree Publishing Company made a written contract with the appellant.

The important elements of the contract are substantially as follows:

> First: The Cree Publishing Company agree to sell to the appellant 1,000 sets of the books "to be delivered f.o.b. bindery as ordered by appellant" and as many more sets as ordered. Appellant to sell 1,000 sets a year;
>
> Second: The appellant to pay $18 per set for the books "payments to be made by 16 equal monthly negotiable notes, dated May 10, 1910, the first note

the terms of an exclusive contract" and that there was a failure of consideration.

On July 12th, the appellant entered into negotiations with the Dove Publishing Company, a corporation, to have it, and each of the Doves (whom incorporated are referred to as called "Doveland Valley of Love") for the joint authorship for sale. Upon completion and to cost $15 per set.

It appears that the Dove Publishing Company might make suitably to make such a contract with the appellant, it was necessary for it, the Dove Publishing Company, to make sure right be Dove a Complete who owned the exclusive rights of sale in certain territory.

Accordingly the Dove Publishing Company took up the matter with Be Dove a Complete and it was agreed between them that Be Dove a Complete would relase certain territory and that the Dove Publishing Company would guarantee them for that release. The consideration agreed upon was half of the profits made by the Dove Publishing Company on each set of books.

On May 23, 1910 the Dove Publishing Company made a written contract with the appellant.

The important elements of the contract are substantially as follows:

Dove: The Dove Publishing Company agrees to sell to the appellant 1,000 sets of the books "to be delivered f.o.b. Kentucky as ordered by Appellant" and as many more sets as ordered. Appellant to pay 1,000 cash a year;

Deeds: The appellant to pay $15 per set for the books "payments to be made by 10 equal monthly negotiable notes, dated May 10, 1910, the first note

to be due July 10, 1910 and one note to be due on the 10th day of each succeeding month", appellant to have the privilege of renewing half of each note for a period of four months and renewal notes to bear six per cent. interest. Appellant to turn over certain leases from time to time as security;

Third: The Cree Publishing Company was to furnish appellant certain sets of lecture and instruction sheets for students;

Fourth: In case the appellant procured special lectures the Cree Publishing Company agreed to pay half the fee paid for them; the price to be mutually agreed upon in advance. The Cree Publishing Company agreed to supervise the periods for said lectures, etc. Each company to have an adequate set of plates and each pay for its own set;

Fifth: That the appellant should not have the right to sell the books furnished by the Cree Publishing Company within certain prescribed territory until a certain contract was cancelled;

Sixth: The appellant to pay $1.50 per volume if there should be additional volumes to said set;

Seventh: The parties to this contract hereby agree to work mutually together to protect each other's interest, making no charges to each other for any services along such lines in an advisory way;

Eighth: The Cree Publishing Company to furnish appellant copies of certain certificates, diplomas, order blanks, forms for keeping accounts, etc.;

Ninth: A provision in regard to the possible consolidation of the correspondence privileges of the Lincoln-Jefferson University and the appellant.

Both parties proceeded to work under the contract. The Cree Publishing Company furnished the appellant about 343 sets of the books, and the appellant made certain payments to the Cree Publishing Company and also gave it certain promissory notes, among which were the two, above mentioned, dated June 23, 1910, and the other two originals, for which subsequently renewals were given.

The four original notes were endorsed (without recourse) and delivered by the Cree Publishing Company to De Bower, (who received them for the De Bower & Chapline Company) and he endorsed and delivered them to the appellee; that being done sometime in July, 1911, which was shortly after the date of the contract between the Cree Publishing Company and the appellant.

Company and the Applicant.

After the date of the contract between the Crew Facilities Company Limited (hereinafter called "the Company") and the Applicant dated the 1st day of July, 1927, which was shortly before the Company commenced the operations hereinafter referred to, the Company duly carried out the said contract and by agreement dated the 1st day of July, 1927, (and hereinafter referred to as the "Deed of Variation") made between the Company (hereinafter called "the Vendor") of the one part and the Applicant of the other part, it was agreed that the said contract should be varied in the manner hereinafter appearing.

The Deed of Variation recited that the Applicant had agreed to purchase from the Company the Crew Facilities Business and the Company had agreed to sell the same to the Applicant upon the terms and conditions hereinafter appearing.

By the Deed of Variation it was agreed that the Company should sell and the Applicant should purchase the Crew Facilities Business as a going concern as from the 1st day of July, 1927, and that the Applicant should pay to the Company for the goodwill of the said business the sum of £1,000 by instalments as follows:

£250 on the execution of the Deed of Variation;

£250 on the 1st day of October, 1927;

£250 on the 1st day of January, 1928;

£250 on the 1st day of April, 1928.

It was further agreed that the Applicant should pay to the Company a royalty of 5% on the gross takings of the Crew Facilities Business for the period from the 1st day of July, 1927, to the 31st day of December, 1928, both inclusive, and that the Applicant should keep proper books of account showing the gross takings of the said business and should allow the Company to inspect the same.

It was further agreed that the Applicant should not during the continuance of the said contract or for the period of two years thereafter carry on or be concerned or interested in any business which should be in competition with the Crew Facilities Business carried on by the Company.

Each party undertook to keep secret the contents of the said Deed of Variation and not to disclose the same to any person except in so far as the same might be necessary for the purpose of carrying out the said contract.

Mixed questions of law and fact arise as to whether the Deed of Variation is void as an attempt to contract out of the provisions of the Companies Act, 1929, or void as a contract in restraint of trade, and whether the Applicant is entitled to the relief claimed.

Mr. [illegible] submitted that the Deed of Variation was void as an attempt to contract out of the provisions of the Companies Act, 1929, and that the Applicant was entitled to the relief claimed.

Mr. [illegible] submitted that the Deed of Variation was void as an attempt to contract out of the provisions of the Companies Act, 1929, and that the Applicant was entitled to the relief claimed.

At the time the said four notes were given to De Bower, he was president of the appellee company and Chapline was vice president, and they both knew the terms of the contract of May 23, 1910, made between appellant and the Cree Publishing Company.

Sometime in the early part of the year 1911, two of the four original notes held by appellee which were dated March 17, 1911 and January 10, 1911 and payable to appellee in sixty and ninety days, respectively, were presented to the appellant for payment. The latter paid $200 on one of the notes, and gave two renewal notes for the balance. The renewal notes were dated March 17, 1911 and January 10,1911, and were payable to appellee in 60 and 90 days after date, respectively.

Before the beginning of this suit the Cree Publishing Company failed and went into bankruptcy and so became unable to carry out its obligations under the contract of May 23, 1910. Altogether the appellant had given the Cree Publishing Company $18,000 in notes; and had paid on them about $6200.

At the time De Bower received the promissory notes in question, the Cree Publishing Company had not defaulted on its contract with appellant and did not default thereon for more than a year afterwards.

It will be seen from the foregoing that the promissory notes in question were all properly executed and delivered; that a consideration was given for them and that at the time they were delivered to De Bower, and subsequently endorsed and delivered to the appellee there was no defect in the

title to said notes and no equities outstanding against them.

The notes, which were complete and regular on their face, were acquired within a few days after they were made and long before they became due; they, of course, had not been dishonored and were acquired in goodfaith and in the regular course of business and for a valuable consideration.

It is the contention of the appellant that no consideration was given by appellees for the notes; but the evidence shows that they were given (in the language of the witness Cree) "in consideration of the permission to go ahead and make the contract with the Hamilton College of Law".

The contract of May 23, 1910 between appellant and appellee was an executory contract and, at the time the notes in question were executed and delivered, that contract remained in force, unbroken by either party, and the presumption was that the contract would be carried out in good faith by both parties.

The language of the court in Siegel v. Chicago Trust & Savings Bank, 131Ill. 569, is as follows:

> "The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on Notice, Sec. 94a; Loomis v. Maury, 16 N.Y. 312; Davis v. McCready, supra."

Young v. Boston Bank, 1811.11. 296, is as follows:

The Defendants at bar came to Issue X. Joining

Issue by Pleading Bank. And the Jury

sworn to try the Issue, appearing by Attorney Bank, and the Plaintiff in Person, appearing by Attorney, first counted the Defendants were no Corporation unknown but, at the time mentioned at Debt 10, 1820 between Plaintiff and Defendants at Boston, etc.

It is the contention of the Defendant that Federal courts are not bound by decisions of state courts; but, on the contrary, are free to decide for themselves. Defendant contends that the Federal courts should follow the decisions of the state courts in matters of common law. Defendant admits that the Federal courts have been divided on the question, but that the majority of decisions are in favor of the Defendant's contention. Swift v. Tyson, 16 U.S. 418; Erwin v. Lowry, 7 How. 172; Pease v. Peck, 18 How. 595; Carpenter v. Provident Institution, 10 Pet. 556; Gelpcke v. Dubuque, 1 Wall. 175; Nesmith v. Sheldon, 7 How. 812; Lane v. Vick, 3 How. 464; Bucher v. Cheshire R.R. Co., 125 U.S. 555; Burgess v. Seligman, 107 U.S. 20; Olcott v. Supervisors, 16 Wall. 678; Mercer County v. Hacket, 1 Wall. 83; Kuhn v. Fairmont Coal Co., 215 U.S. 349; Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368; Dickinson v. Edwards, 77 Fed. 567; Burgess v. Gray, 16 How. 48; Lane v. Vick, 3 How. 464; Bucher v. Cheshire R.R. Co., 125 U.S. 555; Burgess v. Seligman, 107 U.S. 20; Olcott v. Supervisors, 16 Wall. 678; Mercer County v. Hacket, 1 Wall. 83; Kuhn v. Fairmont Coal Co., 215 U.S. 349; Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368; Dickinson v. Edwards, 77 Fed. 567; Burgess v. Gray, 16 How. 48;

The fact that appellee knew all the terms of the contract of May 23, 1910, did not give the maker any equity against the appellee. No one knew at that time that the Cree Publishing Company would break its contract sometime in the future. The notes were properly negotiable from hand to hand and there passed with them at the time of endorsement and delivery a perfect title.

In the case of Jennings V. Todd, 118 Mo. 296, the court went so far as to hold that a collateral contemporaneous agreement, providing that the note should not be paid in the event that an executory contract, which was the consideration of the note, should not be performed, would not defeat the negotiability of the note in the hand of an indorsee though he had notice of such agreement.

The appellant, as a matter of business, saw fit to give its promissory notes under the contract above mentioned for 1,000 sets of books and, at the same time, relied solely and entirely upon the promise of the Cree Publishing Company to deliver the books from time to time. The appellee received the notes in question from the Cree Publishing Company, knowing, of course, that the contract made May 23, 1910, was in full force and in process of execution.

Now, then, can the appellant now contend that these notes, negotiated before a breach of the contract occurred and while the appellant still had his remedy against the Cree Publishing Company upon its contract of May 23, 1910 to deliver 1,000 sets of books, are now subject to all the defenses that could be urged by the appellant against the Cree Publishing Company?

The appellee was not bound to keep watch as to the carrying out of the executory contract between the appellant and the Cree Publishing Company.

As the court said in Davis v. McCready, 17 N.Y.230;

> "To hold otherwise would attach an inconvenient and repugnant condition to such an acceptance. By accepting simply and unconditionally a negotiable bill, the defendants are to be held as intending to give it all the qualities of commercial paper, one of which is that it shall circulate freely for the purposes of business, and be available in the hands of any holder for value. To decide that one who proposed to purchase it, and who had a knowledge of the nature of the transaction upon which it was given, must await the consummation of that transaction would essentially impair its character and legal effect."

It is further contended in appellant's brief, and for the first time in the history of the case, that the promissory note dated January 10, 1911, for $562.50 was materially altered after execution and delivery by adding the words and figures, "with interest at 6%."

It will be observed, however, that appellant in his affidavit of merits filed October 24, 1911, admitted both the making and signing of all the notes sued upon.

On appeal, therefore, appellant having formally admitted the text of thenote in question and having omitted in his pleadings and throughout the trial in the court below to claim that any alteration had taken place, is now estopped. 2 Corpus Juris, 1262.

The judgment is affirmed.

AFFIRMED.

[illegible] the [illegible] [illegible] [illegible]

423 - 21410

CHAS. KRAATZ, ET AL.,
Appellees,

vs.

RIHARD WORKMAN,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

202 I.A. 95

MR. JUSTICE TAYLOR delivered the opinion of the court.

The parties to this cause are owners of adjoining socalled 40 acre farms, between which farms, running practically north and south, a fence was built some 40 or more years ago.

The appellant, Workman, claimed that the fence was not built on the right line and that he was the owner of a strip of the Kraatz (appellee)farm, lying on the east side of the old fence, running north and south and being about 25 feet wide at the north end and 10 feet wide at the south end.

The Kraatz farm was bought by the father of the Kraatz heirs on July 9, 1866. The old fence was erected as marking the west line of the 40 acres as early as 1876. It was originally a rail fence which was repaired from time to time and about 20 years ago was changed into a wire fence consisting of posts on which were strung three wires.

The Kraatz farm had been cultivated ever since its original purchase, practically up to the line of the old

[illegible]

[illegible]

[illegible]

fence. The Kraatz possession of the property in question was obvious and continuous for a period of over 40 years; that is from the year 1875 down to the time just prior to the institution of these proceedings.

The appellant, Workman, bought his property, being a 40 acre farm just west of the Kraatz property, in the year 1905. Some time thereafter he had a survey of his property made and came to the conclusion that the old fence above referred to was not on the proper line. At that time the fence was in a rather poor condition but still was sufficiently substantial to mark the western line of the Kraatz farm.

In the spring of 1914, appellant went over on the strip in question and undertook to take down what remained of the old fence and to erect a new one further east. At the time of the said invasion of the Kraatz possession of the strip in question, appellant had with him, to assist him, his brother and his two sons, one being 14 and the other 11 years of age.

While appellant was taking down the old fence and putting up the new one, two of the Kraatzes appeared and protested and ordered him to stop and leave the premises; but appellant refused to desist and went on with the construction and completion of the fence on the new line.

About three weeks prior to this time, appellant gave the appellee notice in writing that he was going to build a new fence on the line which he, appellant, claimed was the right one.

the Constitution of these Confederates.

The Confederacy, however, never was inclined,
even in time for that fatal year in its short history, to
make a bid which fully met what we like to consider patriotic,
the real issue. Some time co-operation we have a warrant of the
year 1910. Some time co-operation we have a warrant of the old Crown
Prosecutor would not make it the co-operation that the old Crown
Prosecutor to be not to the Justice 1910". We also think
Crown violation to be not to the Justice 1910". We also think
the first time we a warrant took effect of the Justice
Crown.

In the Justice of 1910, Prosecutor must take to the
right to question and consistency to have some constituent
of the old Crown and it stood a new Justice Act.' It
the right to question, Prosecutor and right 1910, to Justice 1910,
the question and its the most complete of the Crown Prosecutor it
there is not.

Until Prosecutor has failed when the old Crown
now to right on not are not, but it the Crown Prosecutor
Act Prosecutor and Crown not also Justice the Crown
Prosecutor to stood of not also not the Act Time.

The old fence being removed, and against the protest of the appellee, the erection of the new one resulted in appellant taking possession of the strip above mentioned and thus dispossessing appellee.

This is an action of forcible entry and detainer brought by appellee to recover possession of the strip of land thus taken from him. The cause was begun before a justice of the peace on April 30, 1914 and was dismissed with judgment for costs against appellee. The case was then appealed to the County Court of Cook County and there tried de novo before a jury which found for the appellee. Judgment having been entered, an appeal was taken to this court by appellant.

It is contended by appelant that his entry upon the strip in question, when he took down the old fence and erected the new one, was peaceable and did not justify the appellee in bringing an action of forcible entry and detainer.

This case is quite similar to Parrott v. Hodgson, 46 Ill. App. 230. The court there uses the following language:

> "The entry in the case at bar was accomplished by the appellant accompanied by two brothers and two or more other persons, who, in the presence of the appellee, and against his protest, tore down the fence, removed it to such place as the appellant claimed marked the boundary of the land he assumed to own, and there rebuilt it. The Circuit Court properly regarded the entry thus made as a forcible entry and a violation of the statutes. The appellant, if the owner of the strip in question, may recover it by an appropriate action at law, but not by acts of violence and a show of superior numbers. Such conduct tends to breaches of the peace and is in disregard and contempt of law."

The old rules would suffice, and ignorance can pardon
less of the application the existence of one else could
in equitable moving jurisdiction of its valid where conditions
and have circumstances existing.

This is an action at fraudulent entry one defendant
brought by application in respect procedure of the entry of
final three years ago. The cause was being tried a
portion of nine months or years or, 1914 when the discovered
main landowner for which relief applied. The case was
then submitted to the Court by fact through the Court
being [illegible] before a jury which found for the plaintiff.
Judgment having entered, no notice was taken of this
appeal by defendant.

It is maintained by appellant that the entry was
the entry is questions, when he took more the 4th forty and
abandon the year was, for proceeding and it was invalid the
entire.

This case is quite similar to [illegible] 22 [illegible],
42 Fed. 450, 452. The court there made the following pertinent
remarks:

"The entry is not done of her not unconstitutional
be the application prescribed by the Secretary and the
of land office, or, in the absence of the [illegible] the
attention, not limited its duration, also during the
term, followed it to which there the applicant
diligent compliance the requirement of the land be required
to own, the entry remedy it. The ultimate result
depending regarded the entry time made on a fraudulent
entry and a violation of the statutes. The ultimate-
ness, if the terms of the entry be complied, may
demand it by an appropriate action at law, but
by writ of injunction the entry of another claimant,
in disregard and violation of the rights of the party not in
possession."

We are of the opinion that the invasion of the strip in question, while it was obviously in the possession of the appellee and had been for over forty years and which invasion was against his will and protest, was an entry by force and justified the institution of a suit for forcible entry and detainer.

The record shows that in the court below appellant undertook to prove his right to possession by offering evidence which he claimed demonstrated that he had the paramount title to the strip in question. Such a defense, however, is not permissible in a forcible entry and detainer proceeding. The proceedings of forcible entry and detainer are wholly statutory and involve only possessory rights and do not allow one who makes a tortious entry to set up the defense of paramount title. The rights which that defense involve may be claimed only in ejectment or some other appropriate proceeding.

The appellant, further, contends that the original notice, complaint and summons did not designate sufficiently accurately the property in question. The original notice, the complaint and the summons all describe the property, of which possession was demanded, as a "strip of land belonging to the east 40 acres taken off the east side of the north fraction of the northwest quarter of section nineteen (19)" etc.

The judgment of the court below is that the appellee herein is entitled to retain possession of "the property in question."

The evidence produced at the trial showed where

the old fence stood and also where the new fence was erected, and there is no doubt, as a practical matter, that all parties understood, appellant, as well as appellee, just what specific property was meant by the description, "strip of land", etc.

A more scientific description might have been given in the notice, complaint and summons if the appellee had first obtained a survey of that particular strip between the lines of the two fences, but, as all the parties knew exactly what property was designated, we do not believe because the description in the papers in question is not set forth in the terms of the surveyor's art, that it is materially defective.

Further,it may be well to call attention to the fact that the claim of the appellant that the description in the original notice, complaint and summons was defective is now made in this court for the first time in thehistory of the case.

The judgment of the County Court is affirmed.

AFFIRMED.

- 22630

C. EDGAR WALLACE,
Appellee,

vs.

CLARA AMALIA MELDAHL and ALICE ELINE T. WEST, both in their individual rights and Trustees,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

202 I.A. 97

MR. JUSTICE TAYLOR, delivered the opinion of the court.

In the court below C. Edgar Wallace presented a petition and asked for an interlocutory order to restrain appellants, Meldahl and West, from proceeding with certain litigation in other courts which litigation pertained to matters already involved in the case at bar.

The litigation, in the course of which the petition in question was presented, has been pending in the lower court for some years and one branch of it has been taken to the Supreme court and there decided.

The opinion of the Supreme court contains the following statement of facts:

"Olga Therese Wallace died on August 5, 1911, intestate and childless, leaving C. Edgar Wallace, her husband, and her two sisters and mother, her only heirs-at-law. Eline T. Johnson, the grantor, died on October 16, 1911, and on the same day Clara Amalia Meldahl inaugurated this controversy concerning the property by filing her bill in the superior court of Cook county for partition, alleging that C. Edgar Wallace, the surviving husband, claimed some interest in the property but had none, and C. Edgar Wallace joined in the contest on the same day by notifying the Northern Trust Safe Deposit Company not to allow the safety deposit box to be opened. Three days after Clara Amalia Meldahl filed her bill in the superior court C. Edgar Wallace

- 10 -

E. CHEVIN BOULDER,

Plaintiff,

vs.

ELVIRA PUBLIC MORTGAGE AND
ABSTRACT COMPANY, a corp. both
in their individual stated
and trustees,

Defendants.

CAUSE CHEVIN.

EXHIBIT CHEVIN INDEX.

ZARKOWSKI-CHEVIN CHARGE

Mr. Justice Taylor, delivering the opinion of the court.

In the court below E. Chevin Boulder brought proceedings in equity and asked for an interlocutory decree to restrain defendants, Whitehead and Dyer, from proceeding with certain litigation in other courts which litigation pertained to matters already involved in the case at bar.

The litigation, in the courts of which the petition in question was presented, has been pending in the Larer Branch for seven years and the transcript of it has been taken to the Supreme Court and there reversed.

The opinion of the Supreme Court contains the following statement of facts:

"Edgar Chevin Boulder died on March 8, 1913, intestate and unmarried, leaving C. Edgar Boulder, her brother, and Dyer, son of a deceased sister, her only heir-at-law. Edgar C. Boulder, the grantor, died on October 12, 1913, and on the same day Elvira Public Mortgage and Abstract Company was appointed temporary administrator of the estate and qualified as such. Edgar Boulder, the surviving husband, claimed some interest in the property but this, and C. Edgar Boulder, joined in the request to the same day by notarially filed his Brothers Court Data Deposit for action for notary appoint: the to be opened. Edgar Boulder, the surviving husband, claimed some interest in the property but this, and C. Edgar Boulder, on the same day by notarially-

filed his bill in the circuit court for partition and a division of the personal property, making himself a defendant to his bill in his capacity as administrator of the estate of his deceased wife, together with Clara Amalia Meldahl and Alice Kline T. West, individually and as trustees. He answered his bill in the circuit court as administrator, alleging that as such he was entitled to possession of one-third of the personal property which had vested in his deceased wife. He also as administrator filed his cross-bill in the circuit court against himself as an individual, making the same claims as in his answer. He answered the bill for partition of the real estate in the superior court, alleging that he was entitled to a one-sixth interest in the real estate, and he also filed a cross-bill in that suit, making the claim to a one-sixth interest. He amended his bill in the circuit court, and that court sustained demurrers to it as amended, and he elected to stand by the amended bill. The court overruled demurrers to the cross-bill, and Clara Amalia Meldalh elected to stand by her demurrer but afterward answered the cross-bill, denying that any interest in the property vested in Olga Therese Wallace in her lifetime or that C. Edgar Walace had any interest in the personal property. The superior court overruled demurrers to the cross-bill in that court and the bill was answered. The suit in the circuit court was transferred to the superior court and the causes were consolidated. Alice Kline T. West filed her cross-bill in the consolidated causes, alleging that her mother was incapable of transacting business and that her deed was void for want of capacity to make it. Clara Amalia Meldahl answered the cross-bill, admitting its allegations, and C. Edgar Wallace answered, disputing them. The consolidated cause was tried and argued in June, 1913, and taken under advisement. Eighteen months afterward, in December, 1914, the chancellor was again advised as to the facts and law by a re-argument, and a decision was reached and a decree was entered in March, 1915. The chancellor by the decree found that Kline T. Johnson was competent to make the deed and it was valid; that the trust was accepted by the trustees; that upon the execution of the deed the equitable fee simple title in remainder in the real estate vested in the grantees, Clara Amalia Meldahl, Olga Therese Wallace and Alice Kline T. West, in undivided equal parts; that upon the death of Olga Therese Wallace, her husband, C. Edgar Wallace, became vested with the equitable fee simple title to an undivided one-sixth of the real estate; that an equitable one-third interest in the personal property vested in Olga Therese Wallace on the execution of the deed and at her death passed to C. Edgar Wallace as administrator of her estate and that he was entitled to the possession thereof. The court dismissed the bill of Clara Amalia Meldahl for want of equity, and also dismissed for want of equity the bill of complaint of C. Edgar Wallace filed in the circuit court."

[illegible] the will in the [illegible] estate for partition and a division of the personal property.

Having thereby a defendant to the bill in the capacity as administrator of the estate of the deceased wife, Herbert Alex. Clare Austin Bedford and Alice Ellen T. Hunt, individually and as trustees, the bill in the [illegible] proceeds the bill in the manner as follows, alleging that on the [illegible] testator, alleging that on the [illegible] possession of non-[illegible] of the personal property which he [illegible] and [illegible] the [illegible] the [illegible] [illegible] [illegible]

The Supreme court decided that it was error, on the part of the chancellor, to sustain the demurrers to the amended bill of the appellee, (Wallace) and the cause was remanded with directions to the Superior court to overrule the demurrers to his (appellee's) amended bill.

The interlocutory petition of appellee, the sufficiency of which is questioned by appellants, recites, among other things, that the appellant (West) in the month of January, 1916 (which was after October 27, 1915, the date of the decision of the Supreme court) filed a bill of complaint in the District Court of the United States and undertook in that cause to have divided and distributed the same property which was involved in the case at bar and which property was then in the possession of a receiver appointed by the Superior court; that, further, the consent of the Superior court was not obtained in order to begin the proceedings in the District court. Inasmuch, however, as it has been shown since then that the case begun in the District Court of the United States has been dismissed those particular recitations need not be considered.

The petition further recites that about March 10, 1916, (which was after the date of the decision of the Supreme court, October 27, 1915,) appellant (West) instituted ~~legal~~ proceedings in the Circuit court of Walworth county, in the State of Wisconsin, making appellee (Meldahl) a party defendant and obtained, in those proceedings, an order appointing a commissioner to divide the very same property ~~which is~~ now in the custody of the Superior court of Cook County; that the commissioner made a report to the court of Walworth county to the effect that he had made such a division; that said report was approved and that said "proceeding

was commenced and conducted without any notice or knowledge on the part of your petitioner and without the consent of the court".

There are, also in said petition, allegations concerning a suit begun by appellee, (Wallace) in the Circuit court of Walworth county, but it is unnecessary here to consider them.

The petition of appellee (Wallace) requests, among other things, "that said Meldahl and West and each of them, their attorneys and agents, be restrained from taking any proceeding of any kind in any other court, respecting the property now in this court, without first obtaining the consent of this court therefor."

The joint and several demurrer of appellants to the petition of appellee recites twelve different causes for demurrer. Only two, however, are discussed by appellants and they are as follows:

First, that the lower court has not, by reason of appellee's amended bill of complaint, jurisdiction over Meldahl and West as trustees; that the proceedings of the lower court are not framed on the theory of a trust deed or upon the theory of the proceedings of the Wisconsin court, and that the court in Wisconsin first obtained jurisdiction over the matters set out in the Wisconsin case;

Second, that the petition does not contain sufficient allegations of fact.

As to the first; the Supreme court having decided that appellee (Wallace) "takes by virtue of the deed one-third of the personal property as surviving husband and it was

the court."

On the part of Bram Bentivoux and others the element of
more unexpected and unwelcome significance was perhaps to encounter

Zenas was, also in more subtle, disconcerting ways
opposed to very young Dr. Schmelzer. (Bentivoux) in the circuit
court of Jefferson County, but it is unnecessarily easy to over-
estimate Zenas' effectiveness in the courtroom. Zenas was
extremely self-conscious about his lack of formal
education, and this was a source of considerable embarrassment to
him. Zenas was also a man of very few words. He was not a
facile speaker. "Zenas Bentivoux was slow and deliberate in
his speech," recalls Judge Hiram Bentivoux (Retired), Zenas'
nephew. "Zenas was also a man of few words. He was not a
facile speaker. He was slow and deliberate in his speech."

The Jefferson Bar Association (Retired) Journals, Annual
Proceedings of the Jefferson County Bar Association for the
year 19__, p. 12.

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embarrassment to him. Zenas was also a man of few words. He was not a
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Bentivoux and longtime Jefferson County Bar Association member.

error to sustain the demurrers to his bill by which he claimed the same and dismiss it;" it follows that the Superior court in the consolidated case now pending there had jurisdiction, by reason of appellee's amended bill, to proceed and determine what constituted appellee's one-third of the property and, by decree, order it turned over to him.

Inasmuch, therefore, as the Supreme court has ordered the demurrers to the appellee's amended bill of complaint overruled, and could have done so only on the theory that the lower court had jurisdiction of the property rights claimed by appellee; and as the subject-matter of the litigation, as far as the rights of appellee are concerned, is the same in this case as in the case pending in Walworth county, Wisconsin; and as the domestic court obtained jurisdiction of the parties and property prior to the foreign court; we are of the opinion that the appellee was entitled by interlocutory motion to petition the chancellor to restrain appellants from prosecuting in a foreign court any litigation pertaining to the property already involved in this case.

Second, as to the question whether the petition of appellee contained sufficient allegations of fact. We are of the opinion that it is superfulcus in such a case as this to set up in exhaustive detail all the facts involved in the litigation, especially, as what is involved by reason of the petition is only ancillary to the main issue in the case. Where such an interlocutory motion is made, the chancellor takes judicial notice of all the proceedings in the case and of all that the record discloses. Where the petition deals with a subject with which, it may be assumed, the appellants are more familiar than the petitioner, it would be unreasonabl to require more than such a statement as will properly appris

them of the nature and basis of the petitioner's motion.

It may be that the petition, judged by the best standards of pleading, is not artistically drawn, but as the matter involved arises after the court has already acquired jurisdiction over the subject-matter of the action and the parties thereto, very little is required in the way of a petition or pleading.

Inasmuch, therefore, as the Supreme court has decided that the Superior court, by reason of appellee's amended bill, has jurisdiction of appellee's rights in the property in question, and believing, as we do, that the petition, as demurred to by appellants, makes sufficient allegations concerning the suit pending in Walworth county, Wisconsin, we are of the opinion that the order of the Superior court should be affirmed.

AFFIRMED.

level of the Nation and people of the Philippines matter.

It has, in fact its history. Perhaps it was best
[illegible] at [illegible], it was [illegible] Spanish, but we are
[illegible] Filipinization have the moral and [illegible] emphasis
Philippine [illegible] and [illegible] of the nation and the
Philippine [illegible].

Sincerely, [illegible], in the [illegible] moral and
[illegible] [illegible] the Philippine moral, [illegible] of Philippine
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

202/100

Filed November 27, 1916

441 - 22396

PEOPLE OF THE STATE OF ILLINOIS ex rel. CLARENCE D. BLACHLY, Appellee,

vs.

PERCIVAL B. COFFIN et al., as Civil Service Commissioners, et al., Appellants.

Appeal from Circuit Court, Cook County.

262 I.A. 100

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Relator filed his petition asking that the writ of mandamus be awarded to reinstate relator to the position of Superintendent of the Bureau of Social Surveys and to compel the city treasurer and the comptroller to pay him his back salary from the date of his removal from office up to the time he shall be reinstated. Appellants filed their general demurrer, which was overruled, and electing to stand by their demurrer an order was entered awarding the writ. It is sought by this appeal to have this order reversed.

The relator alleges that the city council of Chicago passed a city ordinance creating a department to be known as the Bureau of Social Surveys, the chief officer thereof to be known as the Superintendent of the Bureau of Social Surveys; that, as required by the Civil Service Act, the civil service commissioners classified this office; that an examination was held in accordance with the provisions of the civil service law and an eligible list created; that relator passed and stood highest of any person taking this examination and gained first place on the eligible list; that on November 13, 1914, in accordance with the civil service law, the head of the

Department of Public Welfare was notified that there was a vacancy in the office of Superintendent of the Bureau of Social Surveys, and the commissioners in accordance with the provisions of the law certified relator to that vacancy, and he was forthwith appointed Superintendent of the Bureau of Social Surveys; that on the dame date, i. e. November 13, 1914, he entered upon the duties of the office; that his appointment was, in accordance with the provisions of the civil service law, on probation for a period fixed by the rules of the commissioners, and that by these rules the probationary period was fixed at six months; that relator's probationary period of six months began and included the first day upon which he worked, that is, November 13, 1914, and expired at the close of the working day of May 12, 1915; that it is provided by the city civil service law that if an appointee be not discharged at or before the expiration of his probationary period his appointment shall be deemed complete; that the only other method provided for the removal of a civil service employee in the classified service is under that section of the law which provides that no such employee shall be removed "except for cause upon written charges and after an opportunity to be heard in his own defense." The relator avers that after his probationary period had expired, that is, on May 13, 1915, the head of the Department of Public Welfare, under orders from the mayor of Chicago, assumed to remove summarily the relator, without preferring charges against him as required by law; that an appropriation had been made by the City of Chicago for the salary of the office of Superintendent of the Bureau of Social Surveys for the year 1915, to which relator avers he is entitled.

It is contended that the material allegations of the petition are merely conclusions and, therefore, not

admitted by the general demurrer. We are not wholly in accord with this contention. While, examined critically, some of the allegations might be held to be conclusions of law, there remains sufficient allegations of ultimate facts to present a case entitling the relator to the writ.

One of the averments which it is contended is merely a conclusion of the pleader is the averment that on March 23, 1914, the city council of the City of Chicago passed a certain ordinance establishing a department to be known as the Department of Public Welfare, and the ordinance is then set forth in haec verba, commencing with the words, "Be it ordained by the City Council of the City of Chicago." We hold that this is a sufficient averment of the passage and existence of the ordinance, and that it was not necessary to set forth the different steps taken in its passage. This has long been the rule with reference to ordinances, and we know of no case to the contrary.

Another averment said to be a conclusion is the statement that the relator "faithfully and honestly and efficiently performed all of the duties of the said office or position of Superintendent of the Bureau of Social Surveys to the absolute and complete satisfaction of his superior officer, to-wit: the Commissioner of Public Welfare." We do not see how the relator could have otherwise averred efficient performance to the satisfaction of his superior, except by detailing everything he had done in the discharge of his duties. This would necessitate an exhaustive examination which the court should not be called upon to consider as a matter of pleading. It would require the consideration and weighing of evidence, and it is never required that evidence should be pleaded. It is frequently difficult to draw a definite line between conclusions, on one hand, and ultimate

facts, on the other, as has been pointed out by Mr. Justice Brown in Crane v. Schaefer, 140 Ill. App. 647. Consideration of the instant petition leads us to the opinion that the material matters have been pleaded fairly as facts, and that to have gone further would have crossed the line into the realm of evidence.

This court has several times held that a person seeking reinstatement to an office by writ of mandamus must show the legal existence of the office and his right thereto as a matter of law. Rudnik, Admr., v. City, No. 20, 897, opinion filed April 10, 1916, and cases therein cited; Vaughn v. City, No. 21,089, opinion filed February 16, 1916, and cases therein cited.

It is urged that the application of this principle defeats relator's case. The creating ordinance is set out in haec verba in the petition. By its first section there is established a department of the city to be known as "the Department of Public Welfare and which shall include a Commissioner of Public Welfare and such assistants and employees as the City Council from time to time may by ordinance provide." Section 4 is as follows:

"There is hereby created a bureau of the department of public welfare, which shall be known as the bureau of social surveys and which shall collect information and data relating to the actual living conditions in Chicago; facilities for recreation, the causes of vagrancy, crime and poverty; and shall recommend to the City Council appropriate ordinances or statutes for the practical betterment of such conditions. The chief officer of said bureau shall be known as the superintendent of the bureau of social surveys."

Does this ordinance merely create a department or bureau of social surveys without a head, or is there created a "bureau" or department and a chief officer? We are of the opinion that the latter construction is the more sensible one and would give effect to the manifest intention of the council.

In Button v. State Corporation Commission, 105 Va.

634, it was held that the "authority to 'establish' a 'bureau' of insurance, without qualifying provisions, of itself imports the organization of an officered department." This opinion is fortified by definitions of the word "bureau" from Webster's Dictionary and Bouvier's Law Dictionary, and concludes that the word "bureau" implies not merely a division where business is to be conducted under certain rules and regulations, but includes the operating force as well. This construction of the ordinance before us is supported by the reasoning in Wood v. Blanchard, 19 Ill. 38.

In People v. McCann, 247 Ill. 130, the court had before it an ordinance establishing a department to be known as the Department of Police "and to embrace * * one inspector of police," and the court held that the ordinance pleaded created the office of inspector of police, saying it was provided "that as a part of the department there shall be one Inspector of Police for each police division."

Following the reasoning of these cases it is not difficult to arrive at the conclusion that the ordinance not only created the Bureau of Social Surveys but also the position of its chief officer, whose title should be "Superintendent of the Bureau of Social Surveys." This conclusion is not in conflict with what is said in Moon v. Mayor, 214 Ill. 40, and similar cases, including our own recent case of Rudnik, Admr., v. City, supra, where the language of the ordinance is distinctly different from that in the one now under consideration.

Was relator illegally discharged after his probationary period had expired? It is provided by the civil service law, section 10 Hurd's Illinois Stat., page 452, that an appointment such as received by the relator "shall be on probation for a period to be fixed by said rules," and further that "at or before the expiration of the period

of probation the head of the department or office in which the candidate is employed may, by and with the consent of said Commission, discharge him, upon assigning in writing his reason therefor to said Commission. If he is not then discharged his appointment shall be deemed complete." It is averred that the rule of the Civil Service Commission in force at this time was as follows:

"PROBATION. Original appointment shall be on probation for a period of six months, but there shall be no probation period in the case of appointments from promotion lists. If any probationer, upon a fair test, shall be found incompetent or unqualified to perform the duties of the position to which he has been certified, the appointing officer shall certify the same to the commission in writing, specifying his reasons, and request the separation of such probationer. Upon approval by the commission, such probationer shall be discharged. Time served on probation, whether continuous or not, shall be credited upon the period of probation."

It is averred that relator entered upon and performed the duties of the office on November 13, 1914, and from then on and for a period of six months, up to and including the 12th day of May, 1915, and that on the 13th day of May the head of the Department of Public Welfare, under the direction of the mayor of the City of Chicago, made a report to the civil service commissioners stating that the relator was "unqualified for the work," and that "this is in accordance with instructions from Mayor Thompson - see mayor's letter May 12, 1915." It is among other things urged that the attempted removal was not within the probationary period. The statute above quoted provides that if an appointee is not discharged "at or before the expiration of the period of probation * * his appointment shall be deemed complete." If the six months' period of probation had expired, as relator claims, on the evening of May 12th, it would follow that the attempted discharge on May 13th was void. We do not think the ordinary rule that in computing time the first day

must be excluded and the last included, is applicable here, for this would exclude the first day on which the relator worked, namely November 13th, which would conflict with rule 7, providing that time served on probation "shall be credited upon the period of probation." By statute, chap. 131, sec. 10, the word "month" shall mean a calendar month unless otherwise expressed. In Migotti v. Colvill, 4 Com. Pl. Div. 233, it is said that "in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one." Among other cases so holding are McGinn v. State, 46 Neb. 427, and Marcoux v. Society of Beneficence, 91 Me. 250. We are in accord with the reasoning of these cases, and hold that the six months' probationary period of relator expired at the end of the working day of May 13th. There are many other cases supporting this method of computing time, among which are Nesbit v. Godfrey, 155 Pa. 251; Buchanan v. Whitman, 151 N. Y. 253; Vogel v. State, 107 Ind. 374; Taylor v. Brown, 147 U. S. 640. We are of the opinion that the language of the statute, "at or before the expiration of the period of probation the head of the department * * may discharge," together with the clause "if he is not then discharged his appointment shall be deemed complete," must be construed to mean that the appointee, under the provisions and method prescribed by the civil service act and the rules, may be discharged at any time within the six months, to take effect at once or at the end of the period of probation, but if the period of probation is permitted to go by without a discharge the appointee comes under that provision of the statute which says that the appointment shall

be deemed complete. It follows, therefore, that the attempted removal of relator on May 13th was void and ineffective.

It is said that the petition is obnoxious to demurrer in seeking two kinds of relief, namely, the reinstatement of the relator and the collection of back salary, and City of Chicago v. People ex rel. Gray, 210 Ill. 84, is claimed as decisive on this point. There is language in the opinion in this case which seems to support this contention, although a decision on this point was not necessarily involved. In any event, in the more recent cases of People ex rel. Sellers v. Brady, 262 Ill. 578, and People v. Stevenson, 272 Ill. 215, the writ of mandamus was awarded where the prayer of the petition was, as here, for the reinstatement of the relator and also for salary. The case of City v. People ex rel. Gray, supra, came before the court upon petition, answer and replications and demurrers to the replications. Here we have only a general demurrer to the petition, and we are in accord with what is said in McArdle v. City, 172 Ill. App. 142, 156, where the situation as far as pleadings are concerned was the same as here, and wherein the court said: "Waiving the question as to whether the petitioner can obtain all the relief prayed for, if, in his petition, he has asked for some relief that he has shown himself clearly entitled to, the petition is still good, even though he may have sought some relief he cannot obtain. Illinois Watch Co. v. Pearson, 140 Ill. 423." We are inclined to follow these later cases of the Supreme Court, and hold that this petition is not obnoxious to a general demurrer although seeking two kinds of relief.

We hold that the court was right in overruling the demurrer, and the order and judgment are affirmed.

AFFIRMED.

442 - 22397

PEOPLE OF THE STATE OF ILLINOIS
ex rel. J. NORMAN JENSEN,
Appellee,

vs.

PERCIVAL P. COFFIN et al., as
Civil Service Commissioners, et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 103

MR. PRESIDING JUSTICE McBURNEY
DELIVERED THE OPINION OF THE COURT.

By this appeal reversal is sought of the order awarding the writ of mandamus upon petition of Jensen and general demurrer. In some features this case is like No. 22396, opinion this day filed. What is said in that opinion is applicable to most of the points presented in the present case. This petition alleges that in December, 1910, the City of Chicago passed an ordinance, effective January 9, 1911, creating an executive department of the municipal government to be known as the Department of Buildings, which contained among other provisions the following:

> "There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of buildings, and which shall embrace a commissioner of buildings, a deputy commissioner of buildings, an engineer in charge, a building inspector in charge, an elevator inspector in charge, a fire escape inspector in charge, a secretary to the commissioner of buildings, and such number of assistant engineers in charge, assistant building inspectors in charge, building inspectors, elevator inspectors, fire escape inspectors and such other officers, assistants and employees as may be from time to time provided for in the annual appropriation ordinance."

That the city council also passed ordinances known as

PEOPLE OF THE STATE OF ILLINOIS
ex rel. J. BYRON [illegible],
Appellee,

Vs.

PRESTON J. [illegible] et al., ex
rel. [illegible] Commissioners, et al.,
Appellants.

APPEAL FROM
CLERICK COURT.
[illegible] COUNTY.

2052 I.A. 103

MR. JUSTICE [illegible] DELIVERED
THE OPINION OF THE COURT.

By this appeal reversal is sought of the order
granting the writ of mandamus upon petition of Jerome and
General Commerce. (In open Chamber this case is like Ga-
zaga, opinion this day filed. This is much in that
opinion is applicable to most of the points presented in
the record case. This petition alleges that in December,
1910, the City of Chicago passed an ordinance, effective
January 1, 1911, creating an accounting department of the
municipal government to be known as the Department of
Buildings, which ordinance among other provisions the
following:

"There is hereby established an executive
department of the municipal government of the City of
Chicago, which shall be known as the Department of
Buildings, and which shall exercise a supervision of
all [illegible] of buildings, a [illegible] inspection of
[illegible] and all [illegible] of buildings,
[illegible] and all [illegible] of buildings,
[illegible] and all [illegible] of buildings,

general building ordinances of the city, which among other provisions contain the following:

> "The Commissioner of buildings shall appoint according to law at least four architectural engineers and such other engineers and assistants as the City Council may by ordinance provide for service on the engineering staff of the department of buildings. Every person certified to fill the position of architectural engineer shall be a civil, structural or architectural engineer of at least five years training and experience."

That thereafter the civil service commissioners classified the offices and places of employment in the Department of Buildings and the four offices referred to in the building ordinances known as "architectural engineers in the Department of Buildings"; that a competitive public examination for the position of architectural engineer was held, and that the relator, Jensen, took the same and as a result thereof stood No. 2 and was placed upon the eligible list by the civil service commissioners, and thereafter, there being a vacancy, on January 1, 1911, his name was certified to the head of the Department of Buildings and he was appointed to the office of architectural engineer in the Department of Buildings at a salary of $2,400 per annum, and entered upon the performance of his duties; that on January 18, 1915, the city council passed an ordinance known as the annual appropriation ordinance, which among other items appropriated the sum of $2,400 for the office of architectural engineer in the Department of Buildings held by the relator; that on April 1, 1915, there was in existence a certain rule of the civil service commission, known as rule 7, providing for suspension of employees, for the hearing of charges against the same, and for removal and discharge; that relator since his appointment on January 1, 1911, up to April 1, 1915, performed the duties of his office, and that on March 31st he received from the then commissioner of buildings a notice of

Several patrons assistance of the city, which needs after

Supervisor Dennis the following:

"The Commissioner of Buildings shall appoint
[illegible] to [illegible] [illegible] employees
[illegible] may [illegible] [illegible] as the city
[illegible] may [illegible] for services as the city
engineer, chief of the Department of Buildings. Every
person employed in [illegible] position of municipal
engineer, or [illegible] [illegible] and supervisors."

suspension, to take effect April 1, 1915, pending charges brought against him; that on April 2nd he received from the office of the civil service commission written charges of conduct unbecoming an officer; that on May 3, 1915, he appeared before the civil service commissioners and a hearing was had upon said charges, and evidence was submitted both to sustain and disprove the same; that thereafter, on May 27th, 1915, the civil service commissioners entered in the official minutes of the civil service commission a certain order as follows:

> "Upon investigation of the within charges, we find that a notice stating the time when and the place where this investigation was to be held, together with a copy of the charges herein was duly served upon the said J. Norman Jensen more than five days prior to this investigation. And we further find the evidence insufficient to warrant the removal of the said J. Norman Jensen from the service of the City of Chicago, but order that he be separated from the department of buildings and that his name be restored to the eligible list of architectural engineers (for certification elsewhere than to the department of buildings). And it is ordered that no salary be allowed the said J. Norman Jensen covering the period from April 1, 1915, the date of his suspension to the date of this finding."

The petition alleges that subsequently the order was amended by striking therefrom the words "for certification elsewhere than to the department of buildings." The petition also alleges that the civil service commissioners and the commissioner of buildings refused to permit relator to discharge the duties of the office of architectural engineer and on June 1, 1915, assumed to appoint another person in his stead. The petition charges that this appointment is contrary to law, that relator is under the law the occupant of this office, and that he has been at all times since April 1, 1915, ready to discharge the duties of the same; that the city treasurer and comptroller have refused to pay relator the salary to which he is entitled. The prayer of the petition is that the civil service commissioners cancel

and expunge so much of their order of May 27, 1915, as amended, as reads: "but order that he be separated from the department of buildings and his name be restored to the eligible list of architectural engineers"; also that the civil service commissioners and the commissioner of buildings be commanded to reinstate relator to his office of architectural engineer and that he be paid the money due him as salary from April 1, 1915.

The trial court overruled the general demurrer and a writ of mandamus was awarded as prayed.

We hold that the passage of the ordinances was sufficiently pleaded and that the petition avers ultimate facts as distinguished from conclusions, for reasons which are stated in case No. 22396, supra.

Does the language of these ordinances create the office of architectural engineer of the Department of Buildings? As noted above, the language of the ordinance establishing the Department of Buildings provides that it shall embrace a commissioner of buildings, a deputy, and "such number of assistant engineers in charge * * as may be from time to time provided for in the annual appropriation ordinance," and that "the commissioner of buildings shall appoint according to law at least four architectural engineers and such other engineers and assistants as the City Council may by ordinance provide * * . Every person certified to fill the position of architectural engineer shall be a civil, structural or architectural engineer of at least five years training and experience." By the annual appropriation ordinance for the Department of Buildings an appropriation was made for the "architectural engineer." We are of the opinion that these ordinances created the office or position of architectural engineer in the Department of Buildings;

their language is very different from that in the ordinances under consideration in the cases cited by appellants, where it was clearly contemplated that there should be a further ordinance passed by the city council to create the particular office involved. That is not true of the case before us. Here the language is complete and needed no further legislation to create the office.

We think there is no merit in the point that it is not shown that the appropriation ordinance passed by a two-thirds vote. It is not the appropriation ordinance which purports to create the office, but the prior ordinance, and this is pleaded to have been passed unanimously.

It is argued that the only matters into which this court may inquire when reviewing the action of the civil service commission, are whether the commission had jurisdiction and whether its proceedings conformed to the requirements of the Civil Service Act. This may be conceded, as we have heretofore held that the civil service commission having proceeded according to law, the justice or injustice of its conclusion cannot be reviewed; but the justice of the decision of the civil service commission is not now a subject of review. The provisions of the Civil Service law, section 12, chapter 24, provide in part that no officer or employee in the classified civil service "shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense," and further, "The finding and decision of such commission * * shall be forthwith enforced by such officer." Under the authority of section 4 of the Civil Service law, the commission passed rules governing the subject of removals, and it is provided by section 5 of rule 7 that "Any member of the classified civil service of the City of Chicago, who shall be guilty of any one or more of

the following offenses, shall be subject to removal or discharge from the service." It hardly needs argument to show that the only power of the civil service commission under the statute and its rules is either to find the appointee not guilty of the charges made, or, on the other hand, find him guilty and order his removal or discharge from the service. In this case the finding of the commission was that the evidence was "insufficient to warrant the removal of the said J. Norman Jensen from the service of the City of Chicago." This was in substance a finding that the charges brought against him had not been sustained by the evidence. It would follow legally that he would be entitled to be reinstated in his office. The commission, however, undertook in its order to separate him from the Department of Buildings and restore his name to the eligible list of architectural engineers. As the order originally read, it was in effect that his name be restored to the eligible list of architectural engineers in the Department of Buildings, for certification elsewhere than to the Department of Buildings, patently contradictory. This order is wholly without the powers of the commission to make. Rules of the commission provide that an appointee found guilty upon charges heard shall be removed or discharged "from the service"; and the commission having found that relator should not be thus removed had no alternative then to order his restoration to his office.

For the reasons stated in case No. 22396, supra, we are of the opinion that the petition is not obnoxious to a general demurrer on the ground that it seeks two different kinds of relief.

For the reasons above indicated the order and judgment of the trial court are affirmed.

AFFIRMED.

202/118

Filed November 27, 1916

468 - 22423

202 I.A. 118

SANS SOUCI PARK, a corporation, for use of MILES M. FRIED,
Appellee,

vs.

GILBERT M. ANDERSON,
Appellant.

Appeal from Municipal Court of Chicago.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment obtained by plaintiff against him for $4,162.11.

Sans Souci Park, a corporation, hereinafter called plaintiff, on April 12, 1909, entered into a written agreement with defendant giving to him the exclusive concession and license to conduct a theater in plaintiff's premises known as the skating rink building, during the summer season. The defendant agreed to build a stage and prepare the building for theatrical purposes at his own expense. He also agreed to pay plaintiff for lighting, advertising, etc. There is no controversy as to these latter items. Defendant took possession and erected a stage in the skating rink building and prepared it for use as a theater.

It is claimed by plaintiff that in June defendant requested to be permitted to change the grade of the floor so that patrons of the theater sitting in the rear could see the acting on the stage, and that it was agreed between the parties that defendant might construct a graded or sloping floor as a superstructure on the skating rink floor, upon condition that at the conclusion of the summer season defendant would remove this superstructure and restore the skating rink floor to its original condition. It is conceded

that such a graded floor was erected and used during the summer season, but at the conclusion of the summer season defendant did not remove this superstructure, whereupon plaintiff had this done, and is attempting by this suit to recover the cost incurred by it in so doing. Liability for the expense of this work and the correctness of the account for the same are the subjects of controversy.

It is argued by the defendant that the testimony as to the oral agreement in regard to the graded floor was incompetent as tending to modify or change the written agreement. A number of the provisions of the agreement are called to our attention as controlling this particular alteration in the premises, but none of them can reasonably bear the construction claimed for them. One of the provisions is that defendant was to deliver the premises to plaintiff in good repair and condition upon the termination of the agreement "and to make no alteration in the building or buildings of said concession without the written consent of the company (plaintiff), it being understood that the concessionaire (defendant) has the right to erect a stage."

Two considerations are conclusive against defendant's position. The first is that the provision that written consent of the plaintiff must be obtained for alterations in the building was for the protection of plaintiff, which it could waive if it saw fit so to do. The defendant having procured plaintiff's oral consent to the alteration in the floor, cannot now invoke the provision in the agreement for written consent in order to avoid his oral agreement. The other consideration is that, even should the testimony as to the oral agreement be excluded, defendant under the written

agreement was bound to restore the skating rink floor to its original condition. The agreement contemplated the use of the skating rink building by defendant during the summer seasons of six years, with the use reserved to plaintiff during the winter seasons, which would necessitate the removal of the inclined floor. The only alterations mentioned in the agreement are a stage and dressing rooms. Manifestly, if defendant without written consent made such an alteration in the floor as to prevent its use by plaintiff as a skating rink during the winter seasons, he would be bound to restore the floor at the beginning of the winter seasons so that plaintiff could use it.

Upon the trial, after plaintiff and defendant apparently had rested, plaintiff asked permission to introduce some further testimony, which was allowed by the court. There was no abuse of discretion by the trial judge in permitting this. It is claimed by defendant that the court denied him the right to rebut this additional evidence, but inspection of the record does not justify this claim. The abstract does not show that any such request was made of the court, or that any offer was made of further testimony by the defendant.

The evidence shows that a statement of the account of plaintiff against the defendant containing the items claimed to be due, together with credits, was shown to the defendant, who agreed to its correctness, at the same time promising to pay the amount at a later date. Whether or not under the

circumstances this can be called in a legal sense an account stated is not important. It was at least an admission of the correctness of the account as a statement of expenditures and credits. This being uncontradicted it was not necessary for plaintiff to introduce evidence in detail as to the items.

The judgment is fully supported by the evidence and is affirmed.

AFFIRMED.

482 - 22437

CHARLES E. SANDERSON,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

202 I.A. 120

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, driving a horse and wagon, collided with a street car belonging to defendant; he was injured and brought suit and had judgment for $625, from which defendant appeals.

The evidence on behalf of plaintiff tends to show that he lived on Wabash avenue, not far from the point of the accident, and was familiar with the usual rate of speed of street cars on these tracks; that about 2 p. m. on August 10, 1912, he was driving north in Wabash avenue to the right of and outside the northbound street car track; as he approached Eldridge court, a cross-street, he stopped to permit a northbound street car to pass. As the car was passing him he looked to the north and saw another car two blocks away, coming south. He paid no more attention to this southbound car, but waited until the northbound car had passed him, and then turned westward behind this car, across the southbound tracks directly in the path of the approaching southbound car. Plaintiff says that as his horse was crossing this track he looked up and saw the southbound car coming, only two car-lengths away, at 20 or 25 miles an hour. His horse continued

CHARLES S. ANDERSON,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

2021.130

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, driving a horse and wagon, collided with a street car belonging to defendant; he was injured and brought suit and had judgment for $500. From which refusal an appeals.

The evidence on behalf of plaintiff tends to show that he lived on Indian avenue, not far from the point of the accident, and was familiar with the usual rate of speed of street cars on those streets; that about 2 p. m. on August 10, 1903, he was driving north in Indian avenue to the right of and outside the northbound street car track; as he approached Eldridge court, a cross-street, he stopped to permit a northbound vehicle [illegible] to pass. As the car was passing him he looked to the south and saw another car two blocks away, coming north. He paid no more attention to this southbound car, but waited until the northbound car had passed him, and then turned westward behind this car, across the southbound tracks directly in the path of the approaching southbound car. Instantly he and saw the northbound car coming, only two car-lengths away, at 20 or 25 miles an hour. His horse continued

pulling the wagon westward but was unable to clear the track, and the street car struck the wagon at about the rear wheel, throwing plaintiff out.

The greater weight of the evidence shows that without any previous indication of his intention, plaintiff turned suddenly into the southbound track when the southbound car was about 15 feet away, running 7 to 10 miles an hour; that the motorman at once applied the brake and sand and stopped his car within a short distance after the collision; the motorman says it ran only three feet.

We hold that plaintiff was guilty of negligence which contributed to the accident. We have here the case of a driver of a wagon who knew that a car was approaching the point on the track at which he intended to cross, and that if he continued in this intention a collision was inevitable unless the car could be stopped in time. In the exercise of reasonable judgment the plaintiff knew or should have known that, as the northbound car wholly hid him for a time from the view of the motorman of the southbound car, to turn suddenly from behind the northbound car across the path of the other car would not allow sufficient time for the motorman to stop before colliding. Under such circumstances plaintiff should have ascertained the location and situation of the approaching car just before he attempted to drive across its path, and the failure to do this was negligence as a matter of fact. Roberts, Admr. v. Chicago City Ry. Co., 262 Ill. 228. Being of this opinion it is our duty to reverse the judgment with a finding of fact. See our opinion in Davenport v. C. & S. C. Ry. Co., filed January 3, 1916, and cases therein cited.

REVERSED.

482 - 22437 FINDING OF FACT.

The court finds that the plaintiff was guilty of negligence directly contributing to the accident alleged in his declaration.

Use - Model ..... Division of Fruit.

The model fixes most the principle and title of application discovery considering it the material evidence in his declaration.

485 - 22440

BYRON W. WANAMAKER,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

202 I.A. 122

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured in a collision between the wagon he was driving and a street car of the defendant. He brought suit and had judgment for $5,000 which defendant seeks to have reversed.

There is disagreement among the witnesses on many important details of the occurrence. We are of the opinion that the jury, after considering the variant testimony, could properly believe the facts to be substantially as follows: About noon on October 23, 1912, the plaintiff was driving a team of light mules, hitched to a turntable stake wagon loaded with vinegar and pickle casks. He was an experienced teamster and had been driving this particular team of mules a little over a year. He went in an easterly direction on 59th street in Chicago, until he reached Wentworth avenue, where he turned southeasterly diagonally across the two street car tracks on Wentworth, over to the east curb of the street. He drew up alongside and parallel to the curb of the sidewalk, with the mules headed south, at a point 50 feet, more or less, south of the 59th street building line. He made a delivery in a grocery store near this point, and after making such delivery remounted his wagon and turned his mules westward and northward, intending to drive north to the corner of Wentworth and 59th street and east on 59th.

Adjutant.

AA.

Decatur City Military Command,

Decatur, Ga.

Adjutant Fifth Cavalry Corps,

Fifth Army,

Atlanta, Ga.

When plaintiff got on the seat of the wagon he saw a northbound car coming on the easterly track in Wentworth, and at this time it appeared to him to be 400 or 500 feet away. There was another vehicle directly south of him standing alongside the curb, so that the only way he could turn was to drive his team directly onto the track. He started to turn towards the west, and when the mules were on the track he saw the street car then about 220 feet distant. There were street car tracks on 59th street, and plaintiff knew that the northbound car would have to come to a stop at the south side of 59th street. The wagon moved slowly and when the mules struck the track they commenced to slip, and plaintiff's attention was occupied at this time in holding the mules with a tight rein so that they would not fall. The northbound car, however, proceeded and struck the wagon while it was moving, near the left front wheel, shoving it along somewhat until the right front wheel broke, permitting the hub to drop to the surface of the street, and plaintiff was thrown from his wagon and received the injuries complained of. When plaintiff indicated to the motorman his intention to cross the tracks the car was over 200 feet away and going about 15 miles an hour but slowing down. When it was within 20 to 25 feet of the wagon it was going 7 or 8 miles an hour, but the car was allowed to drift and the brake was not applied until the car was just about to hit the wagon.]

From these facts we are not prepared to hold that the jury should not have concluded that the defendant was guilty of negligence and that the plaintiff was free from contributory negligence. When the motorman saw or should have seen, when 200 feet away, that plaintiff was cross-

ing the track, and when he saw or should have seen that on account of the mules' slipping the wagon was moving slowly, he should have controlled the speed of the car so that it could be stopped before striking the wagon. The motorman testified that he could stop his car within 60 to 75 feet when it was going 10 to 12 miles an hour. On the other hand, the jury might properly believe that plaintiff was justified in assuming that in view of the distance between him and the car and the necessity of its slowing down its speed in order to make the stop south of 59th street, he had ample time to cross the track without being struck. The question of negligence, both of the defendant and of the plaintiff, was properly submitted to the jury, and we see no reason to hold that the jury's conclusion is not sustained by the evidence. Applicable to the instant case are expressions of the Supreme Court in Chicago U. T. Co. v. Jacobson, 217 Ill. 404; Chicago City Ry. Co. v. Sandusky, 198 Ill. 400; and of the Appellate Court in Lang v. Chicago City Ry. Co., 181 Ill. App. 654.

Complainant is made of the refusal of the court to give two instructions to the jury as to ordinances in force in the city of Chicago at this time. We are of the opinion that the refusal to give these instructions was proper, as neither of these ordinances was applicable to the situation. The first of these ordinances provides that vehicles shall not turn until a signal is given, but this ordinance has reference to a signal which could be plainly seen from the rear. There was no necessity in this case of giving any signal which might be seen by a person north of the wagon. Furthermore, the movements of plaintiff

and his team were sufficient indication to the motorman of the approaching car of plaintiff's intention to turn across the tracks. The other ordinance prohibits the stopping of a wagon with its left side towards the curb, but this accident did not happen because the wagon while standing still had its left side towards the curb. If the wagon had been standing in this position the street car could have passed without colliding. The pivotal point for the jury to determine was whether the team and wagon turned onto the track when the car was so close it could not be stopped, and not as to the position of the wagon before it started to turn.

Neither was it error to refuse an instruction telling the jury that street cars have a superior right over other vehicles upon that portion of the street occupied by the tracks. It has been held that such an instruction is calculated to mislead the jury, and in North Chicago Street Ry. Co. v. Smadraff, 189 Ill. 155, there is a discussion of this instruction with the conclusion that it "could in no way properly aid the jury in reaching a conclusion" as to whether or not the defendant was guilty of the negligence charged and the plaintiff in the exercise of ordinary care.

It is said that the verdict is excessive. Plaintiff sustained a compound fracture of both bones of the left leg just above the ankle; the bones penetrated through the flesh and clothing. He was in a hospital for a considerable time. The wound did not heal readily, and seven months after the injury an operation was performed consisting of the removal of a piece of bone just above the ankle. In time plaintiff could walk with crutches, then a cane; and there was evidence that the injury is permanent and that he would always be a cripple. We are not constrained to con-

clude that the amount of the verdict is excessive.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

202/125

Filed November 27, 1916

492 - 22452

ERNEST ELLENBOGEN,
Appellee,

vs.

FRANKFORT GENERAL INSURANCE COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 125

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for a loss claimed under two indemnity insurance policies issued by defendant, and for unearned premiums, the policies having been canceled. Upon trial before a jury judgment for $144 was entered against the defendant. By this appeal reversal is sought.

The premiums on the policies were paid by plaintiff to one Isadore L. Kulp, who failed to turn them over to defendant. Payment under the policies was refused by defendant on the ground that the premiums had not been paid to it. Shall this payment to Kulp be held to be payment to the defendant?

About the year 1912 Kulp called at the office of plaintiff and solicited indemnity insurance with the United States Casualty Company. Before this time these parties had never met. At this time plaintiff took some insurance from Kulp. Some ten days or two weeks before May 6, 1915, Kulp furnished plaintiff with two policies written by the New Amsterdam Casualty Company. At that time a Mr. S. H. Goldsmith was the resident manager of the New Amsterdam Company, and Kulp and Goldsmith were apparently

friends and had had some business connection. On May 1st Goldsmith left the employ of the New Amsterdam and became the manager for the defendant. Subsequently the defendant issued two policies for the plaintiff and delivered them to Kulp, who took them to plaintiff saying that he then represented the defendant insurance company, having left the New Amsterdam Company; that Mr. Goldsmith who had been with the New Amsterdam Company was now the manager of the defendant company; that Mr. Goldsmith was a good friend of his and that he wanted plaintiff to take the policies in the Frankfort Company. Plaintiff took the policies in the Frankfort Company with bill for premiums and returned the Amsterdam policies to Kulp. On May 10th Kulp called at plaintiff's place of business and received payment for the premiums in the shape of a check payable to the order of Kulp, who thereupon marked the bill for premiums as paid. This check was cashed by Kulp but the money was not turned in to the defendant.

On May 15th one of plaintiff's employees was injured and the accident reported to defendant's claim department, and an investigation was made by it and letters were written by defendant indicating its liability for payment of losses under its policies. Plaintiff's employee recovered and, the amount of loss to plaintiff being $49, on June 10th a claim for this amount was forwarded to the claim department of defendant. Defendant then informed plaintiff that it had not received the premiums on the policies and could not pay the claim until these were paid. On July 3rd, plaintiff's claim not having been paid, he returned the policies to defendant for cancellation.

We are unable to distinguish this case in any essential particular from the facts in the case of Lycoming

Fire Ins. Co. v. Ward, 90 Ill. 545, in which the court said among other things:

> "and while he (the broker) may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

Counsel for defendant attempt to distinguish this case from the case at bar but, we think, without success. In the Lycoming case there is a slight difference of fact, in that the agent examined the property to see if the risk would be a safe one; that detail would not be present here, as there was no property to be examined. In the Lycoming case it is said of the agent:

> "He conducted himself in all respects as an agent clothed with authority to act, and after he had agreed with the plaintiff to insure her property, he returned with the policy, properly executed, ready for delivery. The plaintiff accepted the policy, and paid the premium in good faith, under the belief that Buschman was the agent of the company."

This exactly fits the situation before us. Other cases involving similar facts, and following the Lycoming case, are Globe Mut. L. Assn. v. March, 118 Ill. App. 261; Gosch v. State Mut. F. Ins. Co., 44 Ill. App. 263; National Hotel Co. v. Merchants' Fire Corp., 183 Ill. App. 71; Frankfort Marine Ins. Co. v. Lynch, 156 Ill. App. 485; Abrahamson v. Hartford Fire Ins. Co., 181 Ill. App. 254. The correct rule is stated in these cases to be, that it is not a question of what was the actual authority of the broker to receive payments, but with what authority had the broker been apparently clothed by the insurance company, and it is said that the possession by the broker of a policy for delivery to the assured gives him apparent authority to receive the premium.

It is attempted by the defendant to avoid the

effect of these decisions by showing that printed upon the bill for premiums presented to plaintiff were the words, "Make all checks payable to the Frankfort General Ins. Co." There is no evidence that plaintiff saw these words or that they were brought to his attention. There are many decisions to the effect that the mere recital upon a bill of this kind is not sufficient notice to a party receiving it. Kinsman v. Kershaw, 119 Mass. 140; Trainer v. Morison, 78 Me. 160; Putnam v. French, 53 Vt. 402.

We think it was a fair question for the jury to determine whether or not under the circumstances this recital in the bill for premiums was sufficient to put the plaintiff upon notice that if payment was made to Kulp it would be at plaintiff's risk.

In addition to the foregoing it may be said that there was sufficient evidence to justify the jury in believing that Kulp was authorized by the company to act as its agent. Goldsmith, the manager, testified that he agreed with Kulp to pay him compensation for effecting the placing of the policies with plaintiff. The books of the company show that Kulp was credited with the commissions on these policies. Goldsmith also testified that only the authorized agents, and not brokers, were charged with the premiums and held accountable for the same, and the books of the company showed that Kulp was charged with the amount of the premiums on the two policies in question.

We hold that defendant was clearly liable under the policies for the amount of loss sustained by plaintiff because of the injury to one of his employees. This amount is $49.

The suit was also brought to recover unearned premium. The total amount of premium paid was $114.20. The

policies contained a provision that they might be canceled at any time by either party, but in case of cancellation by the assured the company would retain a premium computed according to the customary short rates as shown by a table contained in the policies. According to this short rate table the earned premium upon the policies, if they were canceled by the assured within sixty days after their date, would be 30% of the entire premium. The theory of plaintiff upon the trial was that the policies had been canceled by the defendant company, and that therefore it was entitled to the long or prorata rate. On this basis it was found that the earned premium was $19, which deducted from the total premium, without counting the cents, left $95 as the unearned premium, to which was added $49, the amount of plaintiff's loss, making the judgment for $144. We cannot agree with this theory of the plaintiff. We think it clear from the evidence that on July 3rd the first request for cancellation was made, which was by letter of that date from the plaintiff to the defendant, in which plaintiff returned the policies and requested their immediate cancellation. This being so, defendant was entitled to retain the earned premium in accordance with the short rate table. This would amount to 30% of the premium or $34.26; deducting this from the total premium leaves $79.94 as the correct amount of unearned premium due from defendant to plaintiff. Adding this to $49, the amount of plaintiff's loss, makes $128.94 as the correct amount which plaintiff is entitled to recover. If, therefore, there is filed in this court within ten days from this date a remittitur of $15.06, the difference between the proper amount and the

judgment in the trial court, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON MEMITTITUR; otherwise

REVERSED AND REMANDED.

501 - 22467

MARY LASKI,
Appellee,

vs.

NATIONAL COUNCIL, KNIGHTS AND LADIES OF SECURITY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 127

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit upon a beneficiary certificate issued to Joseph Orzel, husband of the plaintiff. He died February 23, 1914. The defense was that the insured in his application had warranted the statement to be true that he drank only two glasses of beer per day, had not been intoxicated within a year, and was temperate in his habits, whereas it was the fact that he was addicted to the intemperate and excessive use of alcoholic liquors; that the benefit certificate provided that if the insured became or was intemperate in the use of liquors after his admission, or if his death should result directly or indirectly from the intemperate use of intoxicating liquors the certificate should become void; and the defendant sought to show upon the trial that the insured was in fact intemperate in his use of liquors after his admission and that his death did result directly or indirectly from the intemperate use of intoxicating liquors.

Upon trial before a jury there was introduced evidence by a physician that he had examined the insured shortly before his death and that in his opinion he died

SCT - C1467

MARY LAMIXI,

Appellee,

vs.

MUTUAL BENEFIT CREDIT
AND LOAN UNION CO. EQUITABLY, a
corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2021.A.127

MR. PRESIDING JUSTICE McGURIN
DELIVERED THE OPINION OF THE COURT.

This is a suit upon a beneficiary certificate issued to Joseph Orzol, husband of the plaintiff. He died February 23, 1914. The defense was that the insured in his application had warranted the statement to be true that he drank only two glasses of beer per day, had not been intoxicated within a year, and was temperate in his habits, whereas it was the fact that he was addicted to the intemperate and excessive use of alcoholic liquors; that the benefit certificate provided that if the insured became or was intemperate in the use of liquor after his admission, or if his death should result directly or indirectly from the intemperate use of intoxicating liquors the certificate should become void; and the defendant sought to show upon the trial that the insured was in fact intemperate in his use of liquors after his admission and that his death did result directly or indirectly from the intemperate use of intoxicating liquors.

Upon trial before a jury there was introduced evidence by a physician that he had examined the insured shortly before his death and that in his opinion he died

of alcoholism. There was also testimony given by other witnesses who worked with the insured as to his habits with reference to intoxication. The trial court, however, ruled that such evidence was incompetent, on grounds which are not made clear, and directed the jury to return a verdict for plaintiff and entered judgment on the verdict.

Whether or not the insured had violated his agreement under his beneficiary certificate, or was in fact intemperate in the use of liquors and had died directly or indirectly as a result thereof, were questions of fact which the jury should have been allowed to pass upon. The evidence offered by the defendant in support of its contention on this point was clearly competent and should have been admitted. If defendant proved the facts alleged in its affidavit of defense there could be no judgment against it.

Complaint is made of improper remarks by the court, but on another trial these are not likely to occur again.

For the errors above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

373 - 22807

LESTER C. SEAWELL,
Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 128

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The facts and questions involved in this case appear in volume 192 Appellate Court reports at page 273, where is the opinion of one of the branches of this court when the case was here before. It went to the Supreme Court consolidated with Looney v. Oregon Short Line Railroad Company, and that court reversed the judgment of the Appellate Court and the Municipal Court and remanded the cause. See 271 Ill., page 538. Upon the second trial in the Municipal Court the jury was directed to bring in a verdict in favor of the defendant, and in so doing the court was following what was said in the Supreme Court decision. Plaintiff has brought the case here on writ of error.

We are of the opinion that the decision of the lower court is in accord with the opinion of the Supreme Court, and regardless of our own judgment in the matter and of decisions in other forums, we must hold that the law of this case has been settled by our own Supreme Court in this jurisdiction. Therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

CLAUDIA C. [illegible],
Plaintiff in error,

vs.

[illegible]
COMPANY,
Defendant in error.

[illegible]

[illegible]

The facts and questions involved in this case appear in volume 192 Appellate Court reports at page 873, where is the opinion of one of the branches of this court when the case was here before. It went to the Supreme Court consolidated with Lowney v. [illegible] Real Property Company, and that court reversed the judgment of the Appellate Court and the Municipal Court and remanded the cause. Ben [illegible] 111., page 302. Upon the second trial in the Municipal Court the jury was directed to bring in a verdict in favor of the defendant, and in so doing the court was following what was held in the Supreme Court decision. Plaintiff has brought the cause here on writ of error.

We are of the opinion that the decision of the lower court is in accord with the opinion of the Supreme Court, and reasonless of our own judgment in the matter and of decisions in other forums, we must hold that the law of this case has been settled by our Supreme Court in such jurisdiction. Therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

381 - 22336

F. W. REID,
Appellee,

vs.

FREDERICK W. McKINNEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

202 I.A. 129

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of the first class brought in the Municipal Court of Chicago by F. W. Reid against Frederick W. McKinney upon a note for the sum of $2500, made by the defendant, dated January 4, 1914, payable sixty days after date to the order of the Martin Construction Co., with interest at six percent per annum from date. This note was endorsed and delivered by the payee to the order of plaintiff. A statement of claim was filed, together with an affidavit of plaintiff's demand, in which the principal of the note, with interest according to its tenor, was claimed to be due and unpaid. Defendant interposed by leave of court an amended statement of defense, an amended affidavit of merits, sundry pleas of set off, also a plea denying the validity of the assignment of the note. Defendant filed with his appearance a request for a trial by jury. On motion of plaintiff the statement and pleas interposed by defendant, together with the amended affidavit of meritorious defense, were stricken, a jury called to assess damages and the damages of plaintiff assessed at the sum of $2787.50. Motions for a new trial and in arrest of judgment were entered and denied, a judgment for the amount of the verdict entered and this appeal prayed and perfected.

T. S. Eliot,
Hospital.
Re.
Possibility of Accident.
Operation.

of Ottawa.

2052 L. 139

Dr. Wheeler kindly undertook the nursing of Mrs Eliot.

The sufficiency of plaintiff's statement of claim was not challenged in the trial court. In neither of the affidavits of merits filed by defendant, nor in any of the pleas of set-off, did defendant set up any indebtedness due to him from plaintiff. A set-off to the amount of $1000 was claimed upon a note made by one A. E. Martin, also another claim of set-off against A. E. Martin or the Martin Construction Company for an amount claimed to be due under an agreement between defendant and A. E. Martin, the amount of which was unliquidated, but which was stated in the statement of set-off and an affidavit accompanying it to be $6000.

We think it clear that the claims of defendant set up in his pleadings and affidavits were not proper to be set off in this action against the claim of plaintiff. Nowhere does it appear that either of the claims of set-off arose out of any transaction in which there existed any contractual relationship between plaintiff and defendant, nor any matters or claims between them upon which an independent action could have been maintained by defendant against plaintiff. The affidavits of defense interposed failing to state facts which in law constituted a defense, or facts which if true would establish a valid set-off against plaintiff's claim, such affidavits were properly stricken from the record on the motion of plaintiff. When this was done all the statements and pleas in defense and of set-off were automatically eliminated.

It was not necessary to join issue on the pleas, as in the Municipal Court the meritoriousness of the defense is tested by the facts set up in the affidavit of defense. In other words, in the Municipal Court if a defendant fails to set up facts in his affidavit of meritorious defense which if true

in fact would in law constitute a defense, defendant's pleadings, whatever they may be, are of no avail. As the affidavits of defendant's several defenses set up no facts constituting either a defense to plaintiff's action or a set-off, the order to strike them from the files was without error.

Pleas, however potent they may be in interposing legal defenses, are unavailing in the Municipal Court unless facts are stated in an affidavit of meritorious defense which in law constitute a defense to the action.

Furthermore, the set-off claimed is in violation of Sec. 12, Chap. 98, R. S., which limits a set-off to the amount of the plaintiff's debt, while the set-off in the case at bar largely exceeded that amount. First National Bank v. John A. Bryant, 185 Ill. App. 119. Moreover, defendant sought to set off a claim for unliquidated damages which, it was held in Madsen v. Hogans, 189 ibid 589, can not be done. Joyce Lumber Co. v. Chicago Lumber Co., 152 ibid 347.

Defendant challenges the judgment on the ground that it exceeds the amount stated in the plaintiff's statement of claim. The statement of claim we think justified the inclusion of interest due upon the note. A copy of the note attached to the statement of claim is made a part of the statement by reference thereto. This was sufficient to warrant the inclusion of interest in the verdict and judgment; moreover defendant stood by as the verdict was rendered and the judgment entered, and made no objection on the ground that interest could not be included. The objection cannot be

availed of when made in this court for the first time. Gamble v. Union Pacific R. Co., 180 Ill. App. 256.

There is no reversible error in this record, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

437 - 22392

LILLIAN TRAFELET by CHARLES TRAFELET, her next friend,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

202 I.A. 131

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $7000 in an action on the case for personal injuries. The cause has been twice tried before a jury, the first trial resulting in a disagreement, the judgment before us for review being the result of the verdict rendered upon the second trial.

Defendant urges in argument two grounds for reversal, but in the conclusion at which the Court has arrived it will be necessary to consider only one, viz: that defendant is not guilty of the actionable negligence charged against it.

The gravamen of the charges in the declaration is negligence in the running and operation of the car and in the running of the same at a reckless rate of speed.

At the time of the accident Lillian Trafelet was under the age of eight years.

The accident in which plaintiff sustained the injuries for which compensation is sought in this action occurred August 29, 1912, near the hour of four o'clock in the afternoon. The facts of the case are substantially that plaintiff, with a companion named Alice Cross, being on Indiana avenue in Chicago, on the west side of the street about midway between Thirty-first and Thirty-second streets, started

[illegible]

[illegible]

[illegible]

to cross Indiana avenue to the east. At the southwest corner of Thirty-first street a building was in course of construction, and the street was obstructed for about 150 feet south of Thirty-first street with building material which reached nearly to the south-bound track, and many pedestrians for some time previous to the accident crossed Indiana avenue at a point south of these obstructions.

Plaintiff was struck by a north-bound car as she and her companion suddenly and without warning ran into Indiana avenue at the point above mentioned, while the offending car was about twenty feet south of the point from which she darted from the sidewalk. The car was running at an ordinary and not an excessive rate of speed; the motorman unavailingly used his best efforts to avoid colliding with plaintiff, by throwing off the power and setting the air brake; but plaintiff ran into the west side of the car about eight feet to the rear of the front, and was injured. The car stopped within seventy-five feet north of the point where plaintiff was picked up after the impact with the car. While plaintiff's version of the occurrence differs in some material aspects from the foregoing, it is our conclusion from the evidence in the record that the accident occurred as above recited.

The evidence does not establish the negligence charged in the declaration - that defendant drove its car at an excessive rate of speed at the time when and the place where the accident occurred - nor can we find from the evidence, taking into consideration the time and place of the accident and the atmospheric conditions, the day being clear, that the car was running at an excessive rate of speed. The place of the accident was not a place at which pedestrians

should cross; it was not a crossing place for pedestrians. But even were the contrary the fact, which it is not, and even assuming that the motorman saw the plaintiff at the moment she dashed from the curb of the sidewalk to cross the street, he could not, in the exercise of extraordinary care and diligence, have stopped the car in time to have avoided the accident. I. C. R. R. v. Eicher, 202 Ill. 556. From the motorman's point of view the accident was unavoidable, regardless of the speed at which the car was proceeding.

The verdict and judgment are clearly contrary to the probative force of the evidence. The obstructions in the street occasioned by the erection of a building did not have the effect of changing the place of crossing for pedestrians from the crosswalk to the middle of the block nor operate to impose a duty upon the servants of the defendant to anticipate that pedestrians would suddenly cross the street in the middle of the block in the face of a car moving rapidly toward them. In the circumstances of this case it was not negligence of the motorman not to sound the gong, if the contention of plaintiff that it was not sounded is the fact. No duty rested on defendant to either slacken the speed of the car or sound the gong in the middle of the block, where the motorman had no reason to anticipate the presence of pedestrians in the path of his car. Still, the preponderance of the evidence establishes the fact that the motorman, as soon as he saw plaintiff, sounded the gong and did all in his power to arrest the speed of the car and to avoid the accident, and that of all the witnesses to the accident he was the first to see the plaintiff. As matter of law no negligence can be attributed to defendant in not sounding the gong nor arresting the speed of the car in the

middle of the block. Rack v. Chicago City Ry. Co., 69 Ill. App. 656. And where, as here, all things possible to be done were done by defendant to avoid the accident, the environment of the parties considered, there can be no liability. Wilson v. Chicago City Ry. Co., 133 ibid 433.

What was said in Davenport v. Calumet etc. Ry. Co., general number 21348, not yet reported, is equally pertinent to the final disposition of this case. In the Davenport case we said:

"This Court on review is not restrained, as the trial Court is, from determining the probative force of the evidence, and when such evidence in its judgment fails to sustain the recovery, this Court may reverse the judgment with a finding of fact. This principle is fully stated in Loettker v. Chicago City Ry. Co., 150 Ill. App. 69, with citation of supporting authority."

For the reasons above given and conforming to the authority of the Davenport case, supra, and many other cases supporting the dicta there found, the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

437 - 22392 FINDING OF FACT.

The Court finds as the ultimate fact that defendant is not proven by the record to be guilty of any of the acts of negligence charged against it in plaintiff's declaration, nor any count thereof, nor in the additional count thereto filed by leave of court.

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450 - 22405

JOHN E. VOS,
Appellee,

vs.

FREDERICK C. FRANKE,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

202 I.A. 133

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $1500 entered upon the verdict of a jury for personal injuries sustained by the plaintiff by being struck by the automobile of defendant driven by defendant's servant.

No question arises upon the pleadings. The cause went to the jury on eight counts of a declaration and a plea of not guilty. These several counts predicated negligence in defendant, in that the automobile which struck defendant was negligently operated, that defendant was negligent in failing to employ a servant with sufficient skill to safely operate an automobile, in failing to provide reasonably safe appliances for controlling and stopping the automobile, and in operating the same at the time in question above the speed limit.

The evidence establishes that plaintiff at the time of the accident was crossing West Sixty-ninth street in Chicago, near the alley between Emerald and Union avenues. He was in pursuit of a man named Kleinschmidt and was hurrying after him and was not on a regular crossing at the time of the accident, but was at the time he was struck south of the centre of Sixty-ninth street, and to strike him

JOHN E. DOE,
Appellee,

vs.

RICHARD C. ROWAN,
Appellant.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

2052 I.A. 133

MR. JUSTICE BRIDGE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $1000 entered upon the verdict of a jury for personal injuries sustained by the plaintiff by being struck by the automobile of defendant driven by defendant's servant.

The question arises upon the pleadings. The cause went to the jury on eight counts of a declaration and a plea of not guilty. Three several counts predicated negligence in defendant, in that the automobile which struck defendant was negligently operated, three defendant was negligent in failing to employ a servant with sufficient skill to safely operate an automobile, in failing to provide reasonably safe appliances for controlling and stopping the automobile, and in operating the same at the time in question above the speed limit.

The evidence submitted that plaintiff at the time of the accident was crossing West Sixty-ninth street in Chicago, near the alley between Emerald and Union avenues. He was in pursuit of a man named Fleischmidt and hurrying after him and was not in a regular crossing at the time of the accident, but was at the time he was struck south of the centre of Sixty-ninth street, and at nearly nine

the automobile, which was proceeding west, was negligently driven upon plaintiff south of the centre of the street, without any apparent cause or necessity. It would almost seem that a spirit of recklessness animated the servant of defendant in driving the automobile upon defendant so far out of the regular path of vehicular traffic. There was no congestion of traffic or street obstruction to excuse the driving of the automobile so far out of its ordinary and usual path. It is said, however, that plaintiff was guilty of negligence in crossing the street at the place he did, but even if this were true, it was not such negligence that caused the accident, for plaintiff had, before being struck, escaped from the path in which the automobile should have been driven. The accident was the direct result of the negligent driving of the automobile. The evidence in the record warrants the verdict and sustains the judgment, unless errors of procedure of a sufficiently serious nature to call for a reversal intervene.

Defendant urges in argument as reasons for reversal, the admission of irrelevant and injurious testimony, the refusal of the trial Judge to submit the three special interrogatories proffered by defendant to the jury, error in giving and in refusing to give certain instructions, and refusal of the trial Judge to instruct a verdict for defendant.

There are some questions which counsel for plaintiff should not have asked, but the ruling of the court on objection to them, promptly made by defendant's counsel, was a sufficient curative. In view of the evidence and the amount of the verdict we cannot say that defendant was prejudiced thereby. Such errors are not of a reversible character. None of the three special interrogatories fulfilled legal

requirement in being single and direct or as relating to an ultimate or controlling fact in the case. They were properly refused. Illinois Steel Co. v. Mann, 197 Ill. 186.

The instructions must be taken and read as a whole, and when so viewed are in every way sufficient and correct upon every legal proposition necessary for the jury to consider in arriving at a correct conclusion as to the law applicable to the facts in evidence. Defendant does not in argument seriously challenge the correctness of the court's rulings upon the instructions.

The request for a directed verdict was properly denied. Plaintiff made a case which presented facts calling for a submission of the case to the jury for its determination.

It was, under the pleadings, competent to inquire into the character of defendant's servant driving the automobile at the time of the accident, as to competency, reliability and reputation. One of the issues joined was the failure of defendant to employ a careful and skillful driver, and that the driver was alleged to be unskilled and a careless driver. Defendant cannot be heard to complain of evidence pertinent to the issues joined. Moreover, evidence of care and competency of the driver is competent both under the circumstances of and the pleadings in this case. In Merritt v. International Harvester Co., 153 Ill. App. 247, evidence of a single act of negligence of the crane man operating the crane which caused the accident in that case was held to be competent. In Consolidated Coal Co. v. Seniger, 179 Ill. 370, it was held that the incompetency of an engineer might be shown otherwise than by general reputation, and in that case it was also held that the certificate of the State Board of

Mine Examiners that the engineer was competent, was not conclusive, and that evidence of his incompetency dehors the certificate was admissible. The evidence in the record stamps both the character and conduct of the driver of defendant's automobile as reckless, and such driver to be an unfit person to be entrusted to drive an automobile, which, when improperly managed, is an instrument of danger to the life and limb of pedestrians and a menace to vehicular traffic.

There is no reversible error in the record, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

456 - 22411

YENNIFE VONDRA,
Appellee,

vs.

JOZEF FELCMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

202 I.A. 136

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal in which plaintiff recovered a judgment for $150, after remittitur upon the verdict of a jury, in an action of trespass.

The parties were landlord and tenant, and the action grows out of the fact that plaintiff, during the term of her lease and on May 21, 1911, moved the major portion of her belongings out of the flat which she occupied as a tenant of defendant, leaving therein coal, wood, some children's playthings, some jewelry, and a few other articles of a domestic character. She retained the key to the flat and the next day returned for what was left of her property, but could not find anything in the flat except the coal and wood, which she subsequently obtained. At the time plaintiff returned to the flat defendant was in possession, making repairs, and when he was asked for the property which plaintiff could not find, defendant retorted that he had thrown it into the alley. We find from the evidence that plaintiff had paid rent for the flat to May 24, 1911, that she had not surrendered possession on May 21, 1911, that defendant, without any legal right, took possession of the flat and therefore is responsible to plaintiff in an action of trespass for the loss of her property counted upon in her declaration, the loss of which is sustained by the evidence, and the cause of such loss is by such evi-

[illegible]

Appellee.

vs.

[illegible]

Appellant.

[illegible]

[illegible]

[illegible]

dence attributable to the conduct and actions of defendant.

While there is a lack of harmony in the evidence, we are of the opinion that the jury might properly find that defendant was guilty of the trespass charged against him in the declaration.

Actual damages being proven, punitive damages also were assessable. When defendant, without plaintiff's consent, entered the flat which he had rented to her during the term for which plaintiff had paid rent, and while she had the key unsurrendered and was still in the actual possession of the flat, such entrance into it was a trespass for which the law will hold defendant liable to respond to plaintiff in such actual and also punitive damages as the evidence shows are assessable. The evidence affirmatively establishes that defendant acted maliciously in entering the flat and throwing the property of plaintiff into the alley, and the jury might so find, as we are convinced they did, in which finding we unhesitating concur.

There are no reversible errors in the rulings of the court upon the evidence or in the giving or refusal to give instructions to the jury. We cannot say from the evidence that because the court sanctioned a remittitur of $100 from the verdict, the assessment of the damages evidenced any passion or prejudice on the part of the jury. The amount of punitive damages to be awarded is, in the first instance, for the jury, and where such are properly assessable the assessment will not, when made within the bounds of reason, be disturbed by the reviewing court. We cannot say that the assessment of punitive damages made by the jury was excessive.

The judgment of the Superior Court does justice between the parties and is therefore affirmed.

AFFIRMED.

459 - 22414

WILLIAM HARTMAN,
Appellee,

vs.

SAMUEL GRATCH and JACOB NEWMAN,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

202 I.A. 138

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a final decree entered in a cause in which all the parties to this appeal were before the court, the controversy involving the dissolution of a partnership between Hartman and Gratch, an accounting, etc. By a decretal order of March 2, 1915, $533.66 was found to be due from Hartman to Gratch. This claim was assigned by Gratch to Newman and in the decree appealed from that assignment was decreed to be null and void.

In the conclusion at which we have arrived, a further statement of the proceedings in the trial court is unnecessary.

The decree recites that "this cause, coming on to be heard upon the third Master's report of Frank Hamlin, Master in Chancery, to whom said cause was referred, and upon all three preceding Master's reports and upon all pleadings filed by the parties hereto and by Jacob Newman."

The findings of fact in the decree support the relief decreed by it. The record before us is what is colloquially termed a "praecipe record," and it fails to include in it the Master's first report. The decree appealed

WILLIAM MARTHAM,
Appellee.

vs.

JAMES MARTHAM and JACOB
MARTHAM,
Appellants.

APPEAL FROM CHEROKEE CHANCERY
OF SUMP COUNTY.

52 Ill. 138

MR. JUSTICE MULKEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a final decree entered in a cause in which all the parties to this appeal were before the court, the controversy involving the disposition of a partnership between Martham and Crutch, an accounting, etc. By a decretal order of March 2, 1872, $5053.60 was found to be due from Martham to Crutch. This claim was assigned by Crutch to Benson and in the decree appealed from that assignment was decreed to be null and void.

In the conclusion at which we have arrived, a further statement of the proceedings in the trial court is unnecessary.

The decree recites that "this cause, coming on to be heard upon the said Master's report of April Term, and upon all former proceedings had," and it fails to indicate in the Master's first report. The Master submitted relief decreed by it. The second point we is what is contained in the Master's report, to which said cause was referred, and upon all former proceedings had, and upon all pleadings filed by the parties hereto and by James Martham."

The finding of fact in the decree supports the finally entered a "praecipe record," and it fails to in-

from comes to this court with the presumption of its verity and correctness. We will assume, as the law requires where evidence which the decree recites was heard has been omitted from the record, that the findings in the decree are supported by such evidence. If there is a lack of evidence in the particulars pointed out, we will assume that it is supplied by the evidence contained in the Master's report omitted from the record, which report was before the Chancellor by whom the decree impugned was entered. A further search of the record, therefore, by this court, the law does not require, and the decree appealed from, in the condition of the record as above recited, must be affirmed.

Notwithstanding the foregoing, we have considered the whole record before us and from it we are firmly of the opinion that the decree of March 2, 1915, adjudicating a claim in favor of Gratch against Hartman was, as to that claim, legally annulled on the proof subsequently adduced, that the assignment to Newman was only an equitable assignment, subject to the further order of the court, that by that assignment Newman was merely subrogated to the rights of Gratch, and when his claim was annulled the rights of Newman under the assignment terminated automatically. Yarnell v. Brown, 170 Ill. 362; Luecht v. Pearson, 101 Ill. App. 236.

The decree of the Superior Court is affirmed.

AFFIRMED.

489 - 22447

EUGENE BUCKMASTER,
Appellee,

vs.

MONIGHAN MACHINE CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

202 I.A. 156

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action in the Municipal Court against defendant to recover commissions at the rate of five per cent upon the sale price of three machines sold by defendant, two to the Brooklyn Cooperage Company and one to Davis & Davis, the sales, plaintiff contends, having been made on information furnished by him to appellant, and that the rate of commission claimed was agreed upon between the parties. On a trial before the court there was a finding and judgment for $865, and defendant appeals.

We think the judgment is manifestly contrary to the probative force of the evidence, and therefore cannot be sustained. In the first place, plaintiff relies upon the witness Rainier, a salesman of defendant, to prove his claim. That Rainier had any authority to bind defendant to pay plaintiff the commission claimed is denied by defendant, and the evidence of Rainier is so uncertain and indefinite in so many important particulars as to make it untrustworthy and insufficient upon which to rest a judgment. This is emphasized by the action of the trial Judge at the conclusion of all the evidence, and when both parties had rested their case, in recalling, on his own motion, Rainier to the stand for further examination and in personally conducting such examination. The Judge opens the examination of Rainier with the following prologue, viz:

THE COURT: "You know, Mr. Rainier, we will have to act a great deal on what your testimony is in relation to this transaction in regard to that machine that was sold down South there, that was first sold to the company that failed to take it." Then the Judge asks this witness, "Now you made the agreement with this Buckmaster down there in regard to the commission down there, didn't you, what he was to get for the selling of that machine?" and Rainier answers, "Yes, not at that time. Not at that time I didn't, he wasn't there." The Judge again asks this question: "When did you make it?" and Rainier answers: "It was understood at that time." This question follows by the Judge: "Yes. Well, I mean now after the sale fell down, when the sale fell down did Buckmaster have anything to do with it?" and Rainier answers: "No, he had nothing to do with it, but Laing and Freret were trying for the contract."

These excerpts are illustrative of the attitude and mind of the trial Judge and the weakness and lack of probative force of the testimony of plaintiff's witness, Rainier. Whatever hand plaintiff might have had in getting Laing & Freret to agree to buy the machine, he had nothing to do with its subsequent sale to Davis & Davis, to whom it was ultimately sold. What Davis & Davis did was to bid for and obtain the contract for the work which Laing & Freret had contracted for, but failed to do, and Davis & Davis, after procuring the contract, bought from defendant the machine which they needed to do that work.

Plaintiff has not sustained his claim by that preponderance of the evidence which the law requires as a sine qua non to his right of recovery. The evidence fails to prove that he was the efficient cause of the sale of the

two machines to the Brooklyn Cooperage Company, or that he had any hand in bringing about such sale even in a remote way, or that he in the first instance suggested to defendant or any of its employees the name of the Cooperage Company as a probable customer. On the contrary, the proof is clear that defendant made the sale without any assistance from the plaintiff. The questions before us are all of fact, and the errors of the court in its rulings upon the evidence have no weight in determining the rights of the parties.

The finding of the court should have been for the defendant, therefore the judgment of the Superior Court is reversed and a judgment entered in this court of nil capiat and for costs, to be taxed against the plaintiff both here and in the trial court.

REVERSED WITH JUDGMENT OF NIL CAPIAT AND FOR COSTS.

490 - 22450

ESTELLA AKIN,
Appellant,

vs.

ROSE ALICE NOLAN et al.,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

202 I.A. 157

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant by her bill seeks to have decreed to her as her own property two shares of stock in Swift & Company, a corporation, and one share of the Peoples Gas Light & Coke Company stock, each being of the par value of $100 and made out in the name of the defendant, Rose Alice Nolan; complainant also thereby sought an accounting against defendant Nolan for money expended in the purchase of jewelry, wearing apparel, cash advanced, theatre tickets purchased, luncheons bought, etc., and which complainant itemizes in her bill at the sum of $802.

The financial transactions here in dispute, as above recited, occurred during the years 1912, 1913 and 1914. The parties to this controversy are an old and a young woman, both spinsters. They became acquainted in December, 1909, and complainant claims that in September, 1911, she and defendant Nolan entered into an oral agreement in substance as follows:

"That said complainant would will, devise and bequeath all of her estate to the said defendant Nolan and also provide for the said defendant Nolan during the lifetime of said complainant, upon condition that said defendant Nolan, if requested by complainant, would protect, care for, and provide for the comfort of complainant during her declining years; that should defendant Nolan marry, either

chamber in Britain:

The Parliament Assembled March 31st, twelve new Members were returned this day to serve in the ensuing Parliament, which is dissolved by Proclamation the 15th of April next ensuing. The Lords and Commons met on the 31st of March.

The Financial Resolutions were agreed to, as above mentioned, without Debate the 3rd of April, 1911, and Bills were brought in thereupon, and passed the Commons, both Parliaments. They Journey completed in December. 1909, and completely dissolved that in September, 1911, and

before or after the death of complainant, or in the event of the death of said Nolan before the death of complainant after the defendant Nolan had made her home with the complainant, then all of the complainant's estate should, in that event, go to the sister of said defendant Nolan, one Catherine L. Nolan, upon the same terms and conditions as should arise in the event that said defendant Rose Alice Nolan should have survived complainant and remained unmarried; that should the defendant Rose Alice Nolan receive the estate of the complainant after her death, or in the event that said estate should go to Catherine L. Nolan, sister of said defendant Rose Alice Nolan, then that portion of the estate of complainant which might be derived directly or indirectly from either of the parents of complainant, but nothing more, should be devised and bequeathed by the complainant to the lawful issue, if any, of complainant's brother, John Henry Akin; that whether complainant's estate should go to the defendant Rose Alice Nolan or Catherine L. Nolan, in either case the beneficiary should pay or cause to be paid to complainant's brother John Henry Akin, should he be in need of assistance and unmarried, moneys from time to time not to exceed the income at the rate of 5 per cent. per annum on the principal sum of $3,500; that should the defendant Rose Alice Nolan marry after the death of her sister (Catherine L. Nolan) then the residue of complainant's estate should go to the other sisters of the defendant Rose Alice Nolan who survived her, provided, however, that if the said defendant Rose Alice Nolan should after such marriage at any time be in need she should be given assistance out of the income of said estate by her sister or sisters taking the same";

that in pursuance of such agreement complainant made and executed her will in conformity therewith; that about January, 1915, defendant Nolan refused to carry out the terms of the agreement and she quit living with complainant; that thereupon complainant demanded that defendant Nolan account for moneys advanced and that she endorse and deliver to complainant the two shes of Swift & Company stock and the one share of Gas company stock, which she had obtained in virtue of the said agreement and in the faith that she would perfomm it on her part. While there are many other averments in the bill, the foregoing are the salient and controlling ones.

The defendant Nolan in her answer denied making the agreement as alleged by complainant, denied that money advances were made by complainant to her under such an agreement, avers that each of the three shares of stock were pre-

sented to her by complainant and delivered during the years 1912, 1913 and 1914 as voluntary gifts; that complainant has the custody of said shares of stock for safe keeping in her safety deposit box and for no other purpose, and that all of said shares of right belong to defendant Nolan.

Upon a hearing before the chancellor, the bill was dismissed for want of equity, and complainant in an endeavor to reverse that decree prosecutes this appeal.

The record presents two questions for our determination: 1st. Is the agreement with defendant Nolan, averred by plaintiff in her bill and supported by her testimony, if enforceable, proven? 2nd. Are the stocks and other things bought by complainant and delivered to defendant Nolan voluntary or conditional gifts?

The evidence develops the fact that complainant formed a strong attachment for defendant Nolan; that there were twentyyears of disparity in their ages; that complainant was desirous of, in a measure, monopolizing the affection and attention of Miss Nolan; that during the existence of the friendship complainant was generous and kind to her; that she made presents to her of the things in controversy; that she desired to retain Miss Nolan's affection and her attentions and wished her to care for complainant in her old age.

By mutual agreement Miss Nolan and her family and complainant moved into a flat, 823 Montrose Boulevard, on May 1,1913, and there abided as one family until March 5, 1915, when complainant, by request of Miss Nolan, left the flat.

That the friendship was strong while it lasted is fairly inferrable from the testimony. That it was severed in bitterness and illfeeling is likewise patent. The cause or reason for such differences is immaterial to the rights of

the parties under the law. If we should find from the proofs that Miss Nolan was ungrateful and had been unkind in her treatment of complainant, that she had even been harsh with her, such finding would not avail as a factor in determining the rights of the parties under the agreement claimed by the complainant to exist between them. The only witnesses to this alleged agreement are the parties to it, one of whom affirms and the other denies. The learned Chancellor saw the witnesses and observed their manner upon the witness stand. Their bias, their prejudices, their good or evil temper, if any existed, were made manifest upon the hearing, and the Chancellor was from these advantages - not possessed by us - the better able to judge of the veracity or lack of it of the two witnesses and the weight to be accorded their testimony. Under such circumstances, unless the finding of the Chancellor is manifestly contrary to the probative force of the evidence, we are not permitted to disturb it.

A careful examination of the testimony, however, convinces this court that complainant has failed to establish by a preponderance of the evidence the agreement contended for by her. This elementary principle cannot be dispensed with inaa court of equity. Furthermore, we are inclined to the opinion that the circumstances and environment of the parties as developed by the testimony tend to discredit the alleged acceptance of the agreement as claimed and outlined by complainant in her bill and in her testimony. We therefore find that complainant has failed to establish the agreement which she seeks to enforce against Miss Nolan in this litigation by that quantum of proof which the law requires as a requisite to a right of recovery.

derives no substance to a right of innocent.

this litigation by that measure of fraud which the law re- garded as so heinous a violation of the duty of good faith as to enforce against the party in default any contract which was sought to be enforced by means of it. Such a finding from the parties under the law. It we should find from the proofs that Miss Holmes was ignorant, and had been misled to her detriment by concealment, that she had even been dealt with by counsel for the plaintiff as a factor in effecting the rights of the parties under the agreement claimed by the complainant to exist between them. The only witnesses to this alleged agreement are the parties to it, one of whom suffers and the other denies. The learned Chancellor saw the witnesses and observed their manner upon the witness stand. Their plea, their credibility, their good or evil character, if any existed, have made manifest upon the hearing, and the Chancellor saw from these advantages - one possessed by us - the better able to judge of the veracity or lack of it of the two witnesses and the weight to be accorded their testimony. Under such circumstances, unless the finding of the Chancellor is manifestly contrary to the preponderance of the evidence, or was not permitted to stand it.

A careful examination of the testimony, however, convinces this court that complainant has failed to establish by a preponderance of the evidence the agreement contended for by her. This elementary principle cannot be disregarded with impunity. Furthermore, we are inclined to the opinion that the circumstances and environment of the parties as developed by the testimony tend to discredit the alleged assistance of the defendant as claimed and outlined by complainant in her bill and in her testimony. We therefore find that complainant has failed to establish the

The agreement contended for not having been proven, the shares of stock and other property acquired by Miss Nolan through the generosity of complainant therefore bear no relation to it, and the question now to be decided is, whether or not the stocks and property so bestowed were voluntary gifts or made with an understanding that they or any of them should be returned upon the election or demand of complainant.

What the expectation of complainant was at the time the several gifts were made is of no controlling force unless some express agreement or understanding regarding the matter was made. The occasion of the several gifts appears from the testimony of both the contestants, and we think such testimony is soluble only upon the theory that they were voluntary gifts, made on occasions and under circumstances which stamp them all as voluntary gifts. Weighing the evidence and all the questions in this record, we cannot lose sight of the fact that complainant was a licensed practitioner of the law, a woman of wide experience in business and legal matters, and therefrom it may be assumed that she must have known and realized that a writing to evidence an agreement of the character of the one asserted by her with Miss Nolan, which was to continue, as she claims, not only during her life but to be performed in part after her death, was a legal necessity. It may likewise be presumed that she must have known as a matter of law that when the several shares of stock were taken in the name of Miss Nolan and delivered to her, they thereby became Miss Nolan's absolute property. The other property involved was given on gala occasions, such as summer vacations, Christmas holidays, etc., and we will assume that she further knew as a matter of law that if the shares of

stock were delivered to her simply for safe keeping, but not with the intention of passing the title, then an endorsement of the certificate by Miss Nolan, either in blank or to complainant's order, was necessary to pass the title to such stock.

The decree of the Circuit Court dismissing complainant's bill being right is affirmed.

AFFIRMED.

498 - 22464

DAVID JOSEPH,
Appellee,

vs.

CHICAGO CITY RAILWAYS COMPANY,
Appellant.

APPEAL CIRCUIT COURT OF COOK COUNTY.

202 I.A. 159

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had judgment upon the verdict of a jury against defendant for $4000, and defendant brings the record here for review on appeal.

By his one count declaration plaintiff claims that while he was a passenger on defendant's car on Halsted street he indicated his intention of alighting at Oakdale avenue; that the car was brought to a standatill and that as he was about to step from the car to the roadway the car was started with a sudden and violent jerk, as a result of which jerk he was thrown with great force and violence to and upon the ground and greatly injured. To this one count declaration defendant interposed a plea of the general issue.

The declaration alleged Oakdale avenue as the place of the occurrence of the accident, and subsequently the declaration was amended by striking out Oakdale avenue and inserting Wrightwood avenue in its stead. To the declaration as thus amended defendant again pleaded the general issue. Defendant assigns and argues five errors with reasons for reversal, but in the conclusion at which we have arrived one of them only is material to our decision, viz: that the verdict and judgment are against the weight

DAVID THOMSON,
Appellee.

To.

CHARLES ELLIS MARTINEAU
CORPORATE.
Defendant.

ATTORNEY GENERAL FOR THE CO
FOR CORPORATE.

20 J.J. 139

Mr. Justice Brooke delivered the opinion of the Court.

In an action for personal injuries plaintiff had judgment upon the verdict of a jury against defendant for $5000, and defendant brings the record into for review on appeal.

At the time complained of plaintiff was employed by defendant as a lineman; that the car was running on a single track and that while on the line of the defendant's road on Orchard street in the city of Denver, on the 9th day of April, 1904, he was thrown from a pole and injured. He brings this action to recover damages for the injuries received, alleging that the defendant negligently failed to furnish him a safe place to work in the manner in which he was directed to work, in a certain particular, to wit: that the car in the course of its operation was allowed to run at a high rate of speed, to wit, at the rate of twenty miles an hour, and that by reason of the premises he was thrown from the pole and injured.

The declaration filed contains averments as to the duties of the defendant as the employer, and subsequently alleges as the negligence of the employer, and subsequently the insufficient and improper telephone service in his charge. In the declaration as filed counsel for plaintiff stated that the defendant was guilty of negligence in the manner: that the car was running at a high rate of speed at the time complained of, but it was not alleged in the declaration that the defendant was guilty of negligence in the manner in which the car was operated. Under the evidence in the case, however, the defendant could not have been prejudiced by the omission of such allegation from the declaration, and the objection is not well taken.

of the evidence on the question of defendant's liability. The evidence being in inextricable conflict as to the manner of the occurrence of the accident, and the credibility of the witnesses being a strong factor in the solution of the questions thus in dispute, it became in the first instance the province of the jury to reconcile, if possible, such evidence, and therefrom to determine the facts. While the trial court had no power to weigh and decide as to the preponderance in the conflict of evidence, this court is not so circumscribed in its powers to determine questions of fact. Where it is patent that the verdict of the jury is manifestly contrary to the preponderating force of the evidence, it is incumbent upon this court to reverse with its findings of fact. Loettker v. Chicago City Ry. Co., 150 Ill. App. 69.

From a careful review of the evidence we find the ultimate facts as follows:

That plaintiff conducted a grocery and also taught Hebrew; that on February 18, 1913, plaintiff boarded a northbound Halsted street car of defendant with the intention of alighting at Wrightwood avenue to go to a place in that vicinity to give a lesson in Hebrew; that plaintiff did not make known his intention of leaving the car at Wrightwood avenue, but that after the car had proceeded several hundred feet north of Wrightwood avenue he suddenly and hurriedly made his way to the back platform, while the car was still moving at a moderate speed and, in disregard of the warning of the conductor to wait until the car came to a stop, the conductor having in the meantime signaled the car to stop, jumped from the running board while the car was in motion and was seriously injured. The car was im-

mediately stopped and backed to the place where plaintiff was lying unconscious. He was then put upon the car platform and the car was backed to a point near Wrightwood avenue opposite Lehman's drugstore on the east side of Halsted street, about fifty feet north of Wrightwood avenue. Plaintiff was taken from the car into the drugstore in an unconscious condition and given some first aid treatment; an ambulance was called and he was taken to the Alexian Brothers hospital, where he remained until March 3, 1913. Plaintiff was unconscious for some time following the accident.

Defendant produced six witnesses whose versions of the occurrence are in harmony with the facts as above recited. The conductor, who was an eye witness to the accident, died before the trial; but a policeman who was on a car following the one from which plaintiff fell, testified that he saw the accident, and that plaintiff stepped off the car and fell to the ground while the car was in motion.

Plaintiff, to substantiate his version of the accident, which was that the car stopped while he was in the act of stepping from it and that it started with a sudden jerk, causing him to fall to the ground and injuring him severely, produced three witnesses - Carnow, Cohen, and Rust. The evidence of these witnesses is of such a character that it impresses us in each instance as being largely fabricated. They all testified that they were in the vicinity of the accident at the time it happened. None of them took part in ministering to plaintiff in any way nor in taking him to the hospital; and as plaintiff was unconscious there could be no communication between any of these witnesses and himself. It does not appear that any

one of plaintiff's witnesses gave his name to the conductor of the car or to any police officer, of which there were several present, between the time of the accident and the taking of plaintiff in an ambulance to the Alexian Brothers Hospital. The circumstances detailed by these witnesses as to how they came to know of the suit and as to their being material witnesses for the plaintiff, were at least novel, if veracious.

Cohen testified that he walked with a friend named Israel one Sunday to the Alexian Brothers Hospital, barring which fact Cohen knew nothing about Israel. Nor did Cohen know anything about plaintiff being in the Alexian Brothers Hospital at that time, but he testified that on entering the hospital with Israel he heard three women talking Jewish together about the accident. One of these women was the wife of plaintiff. The occurrences mentioned must necessarily have been while plaintiff was in the hospital, which he left March 3, 1913, yet Cohen never saw plaintiff at the hospital nor anywhere else until two weeks before the case was tried, nor did he make any effort to see plaintiff at the hospital, or elsewhere. His testimony as to every material fact was shifty and evasive.

Carnow, while claiming to be at the scene of the accident, made no inquiry to ascertain who plaintiff was, and he says that the first knowledge he had of plaintiff's identity with the accident was gained from an account of it which he read in the "Jewish Courier." Sixteen or seventeen days after the accident he went to see plaintiff, but while he gave him his address he never saw plaintiff from that time until a short time before the trial. It taxes credulity somewhat to repose much confidence in this story.

Rust discredits himself by the utter improbability of his statement of what occurred between himself and plaintiff at the time of the accident. He says that he saw plaintiff twice, once on the day of the accident at the drug store and the second time in the court room on the day he testified at the trial. Plaintiff was indisputably unconscious while at the drug store, yet Rust said that he was being asked questions as to how he was hurt; that while he (Rust) didn't speak to anybody in the drug store, he left his card with plaintiff, stuck it right in his pocket; that plaintiff was seated in a chair when he did this and his eyes were open; that he was looking at Rust and appeared to understand what he did. The testimony of this witness impresses us as being an invention, pure and simple. It was a case of the witness drawing for his facts upon his imagination and not on his recollection.

It is clear that plaintiff failed to prove his case by any creditable or believeable evidence.

The judgment is clearly against the preponderance of the evidence, and it therefore becomes our duty to reverse the judgment of the Circuit Court, with a finding of fact. Davenport v. Calumet & Chicago Ry. Co., Gen. No. 21348, opinion not yet published.

JUDGMENT REVERSED

WITH FINDING OF FACT.

498 - 22464 FINDING OF FACT.

The court finds that defendant is not guilty of any of the acts of negligence charged against it in plaintiff's declaration.

446 - 19849

OTTO MILLER, et al., Appellees,

vs.

GUSTAVE ANDERSON, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 168

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Appellees brought suit against appellant to recover commissions as real estate brokers for obtaining a purchaser for appellant's property. The case was tried before the court without a jury, and a judgment was entered in favor of the appellees for $1291.87.

The only question for our consideration is whether the evidence sustains the finding and judgment of the trial court.

Appellees were regularly licensed real estate brokers, their office being located at 79th and Halsted streets, Chicago, on the property involved in this case, which was owned by appellant. Appellant listed the property for sale with appellees for $55,000 cash, and agreed to pay the regular commission of two and one-half percent. On or about May 7, 1911, a Mr. Goodman, who afterwards purchased the property from appellant, saw appellees' signs on the property and called at their office in reference to purchasing the same. Appellees gave him the details, the price, and the same name of the owner. Goodman suggested trading certain real estate owned by him for the property and left a

Ref - 12810

City Solicitor, et al.,

Respondents,

-vs-

Supreme Court

Appellate Division

1st Department.

2021.A.168

Mr. Jonathan Lubell of counsel submitted the

following at the hearing.

Appellants brought this Article 78 proceeding to com-
pel the respondents to rent vacant housing for individuals a
nonprofit, tax exempt corporation. The suit was filed
in lieu of the application for 12821.87.

The only question for our consideration is whether
the petitioners exercise the timely and diligence of the prudent
owner.

Appellants were regularly licensed real estate
brokers. Their office being located at 2210 Mac Dougal
Street, Harlem, as the landlord testified in this case,
which was known to appellant. Appellants listed the premises
for sale with appellants for $30,000.00 cash, and agreed to pay
the regular commission of two per cent(2%) percent. On or
about May 4, 1971, a Mr. Hopkins, the alternate president
the petitioner then appellant, was informed by the
petitioner that appellant was ready to
buy the house. Appellant gave him the deposit, the papers,
and for some reason of the owner. Thirteen months thereafter
petitioner that appellant would be ready to

memorandum of the same with appellees showing his name as owner. Shortly afterwards, appellees' representative submitted Goodman's proposition to appellant, told him the name of the prospective customer and showed him the paper, but appellant refused to entertain the proposition, stating that he wanted cash and not trade for this property. Afterwards appellee reported this to Goodman who suggested that he would take the property at $55,000 cash, provided appellees could dispose of his property. Appellees continued in their efforts to sell the property to Goodman, procured prospective tenants for a proposed building to be erected on the premises and obtained architects estimates as to the costs of such building. They also endeavored to make a sale of the property to other parties, but were unable to do so. Negotiations were carried on with Goodman until about May 15th. Nothing further appears to have been done until about June 18th, three days before the sale of the property, when appellees' representative telephoned Goodman's office and talked to the latter's brother concerning the sale of the property. About June 15th, Albert L. Strauss, another real estate broker, told Mr. Gross, one of his salesmen, that Goodman was interested in purchasing appellant's property, and directed Gross to get all of the facts from appellant, which he did, and on June 19th, Gross submitted an offer of $53000 cash to appellant on behalf of Goodman. Appellant thereupon called up appellees and informed them that he had an offer on the property and stated that, while he desired them to earn the commission they would have to act quickly in order to do so. Appellees requested further time, which was granted, and on the next day went with appellant to another prospective purchaser.

On the morning of June 21st appellees telephoned appellant that they were unable to make the sale. Thereafter on the same day appellant executed a contract in Strauss' office for the sale of the property to Goodman for $53,000, and agreed to pay Strauss two and one-half percent commission. Appellant called at appellees' office that evening and informed them that he had sold the property and stated he was sorry appellees were unable to earn the commission. Upon being asked the name of the purchaser, appellant replied that he had sold the property to Goodman, whereupon appellees stated that Goodman was their customer and claimed the commission. Appellees' attorney was then called in and he suggested the appellant should not pay the commission to Strauss until it was determined who was entitled to it. Appellant afterwards, however, paid the commission to Strauss, who in accordance with his agreement with Goodman made before the signing of the contract, paid Goodman $450 of the commission.

Appellant contends that the judgment is erroneous in that the evidence does not sustain the finding that appellees procured a purchaser for the property. In support of this contention appellant argues that the negotiations with appellees had been abandoned by Goodman for at least a month before the matter was taken up by Strauss; that the only offer made to appellees by Goodman was to trade for the property; that Goodman was induced to make a cash offer through the efforts of Strauss; that appellant's proposition was for a cash sale and that appellees, having failed to produce a purchaser for the property, were not entitled to the commission.

We have carefully examined all of the evidence in

the record, and are clearly of the opinion that there is evidence sufficient to warrant the finding of the trial court that Goodman had not abandoned the negotiations for the purchase of the property. Goodman testified that the property did not pass out of his mind, and there is no evidence that Goodman was induced by Strauss to make a cash offer. On the contrary the evidence clearly shows that Goodman informed Strauss, who was a friend of long standing, that he desired to purchase the property and told him to put the deal through, Strauss agreeing at the time to pay Goodman a part of the commission; that Goodman was familiar with the property, and it was unnecessary for Strauss to examine the same. Goodman learned that the property was for sale through appellees' signs and obtained information and the terms upon which it could be purchased from appellees. The property was never listed with Strauss, and there is no evidence that Strauss ever sought Goodman as a customer. In fact it clearly appears that the only information Strauss had in reference to the property was obtained from Goodman. The contention of the appellant that the finding and judgment of trial court is not sustained by the evidence is untenable.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

26 - 21245

JOHN GLEASON,

Plaintiff in Error,

vs.

M. P. BYRNE CONSTRUCTION COMPANY,

Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 169

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is an action on the case brought by the plaintiff in error against the defendant in error to recover for personal injuries. At the close of all the evidence the court instructed the jury to find the defendant not guilty. The jury returned a verdict accordingly, a motion for a new trial was overruled, and judgment entered upon the verdict.

At the time of the injury complained of, the defendant was engaged in constructing a sewer ~~in Chicago~~. Plaintiff was employed by the defendant as a brick layer. In the prosecution of the work a trench was dug about seventeen feet deep and ten feet wide. The sides of the trench were lined with sheeting to prevent the walls from caving in and about three feet below the surface of the ground a stringer ran lengthwise of the trench which held the sheeting in place. The stringers were held firmly against the sheeting by braces placed about eight feet apart, which extended across the trench from side to side. Planks were laid upon these braces forming a scaffold upon which some

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of the men stood while doing their work. As the sewer was constructed these scaffolds were moved forward in the trench. Four gangs of men were used in the prosecution of the work known as brick-tossers, scaffold-men, tenders and bricklayers. The brick-tossers stood on the bank and tossed brick to the scaffold-men; the scaffold-men passed the brick to the tenders who were below in the trench, and the tenders in turn passed the brick to the bricklayers who were working in the bottom of the trench and directly under the scaffold men. Just before the accident the men had constructed a new section of the scaffold, and in doing so a plank was handed down which was too short. The foreman who was in charge of the material was informed of this and he instructed the scaffold men to place a short piece of wood known as a shoe diagonally across from the brace to the stringer and place the end of the plank on this, which was done. The men then proceeded with the work for about ten or fifteen minutes when a man named Martine, a tender working in the bottom of the trench, who was also a representative of a labor union, got out of the trench on account of a dispute with some non-union men who were hauling material in connection with the work. A few minutes later, as he was returning to his work in the trench, he stepped or jumped on the plank causing it to slip off the shoe and fall on the plaintiff who was engaged in laying brick in the bottom of the trench. The injury thus received by plaintiff is the basis of this suit.

The declaration alleged the failure of the defendant to furnish plaintiff with a reasonably safe place in which to do his work. Plaintiff contends that the evidence introduced in his behalf tended to show that the defen-

of the men stood while doing their work. As the sewer was constructed three scaffolds were moved forward in the trench. Four pairs of men were used in the process of the work known as brick-tenders, scaffold-men, tenders and bricklayers. The brick-tenders stood on the bank and passed brick to the scaffold-men; the scaffold-men passed the brick to the tenders who were below in the trench, and the tenders in turn passed the brick to the bricklayers who were working in the bottom of the trench and directly under the scaffold men. Just before the next shift the men had constructed a new section of the scaffold, and in doing so a plank was handed down which was too short the foreman who was in charge of the material was informed of this and he instructed the scaffold man to place a short piece of wood known as a shoe diagonally across the trench to the stringer and place the end of the plank on this, which was done. The man then proceeded with the work for about ten or fifteen minutes when a man named Martine, a tender working in the bottom of the trench, who was also a representative of a labor union, got out of the trench on account of a dispute with some non-union men who were installing material in connection with the work. A few minutes later, as he was returning to his work in the trench, he stepped or jumped on the plank causing it to slip off the shoe and fall on the picketry who was engaged in laying brick in the bottom of the trench. The injury thus received by plaintiff is the basis of this suit.

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dant was negligent in the construction of the scaffold; that it was defendant's duty to furnish the plaintiff a safe place to work, and that it failed in this regard, and therefore the case should have been submitted to the jury.

Defendant contends that the verdict was properly directed; "first, because the proximate and sole cause of this injury to Mr. Gleason was due to the act of Martine in jumping or stepping down in such a manner as to cause the plank in question to fall; second, that if there were any negligence on the part of any person it was that of a fellow servant of the plaintiff."

In passing upon the action of the trial court in directing a verdict, the evidence which contradicts that in favor of the plaintiff must be disregarded, and all reasonable inferences must be drawn most favorable to the plaintiff. The evidence cannot be weighed, and if the facts are reasonably capable of a construction favorable to the plaintiff such construction must be adopted. Wolf Co. v. Refrigerating Co., 252 Ill. 491. If there is in the record evidence from which, if it stood alone, the jury could without acting unreasonably in the eye of the law, find that the material allegations of the declaration have been proved the case should be submitted to the jury. Libby, McNeill & Libby v. Cook, 222Ill. 206. The same rule applies whether the motion for a peremptory instruction is made at the close of the plaintiff's evidence or at the close of all the evidence, except where the defendant has produced uncontradicted evidence of an affirmative defense. Libby, McNeill & Libby v. Cook, supra; Balsewicz v. C. B. & Q. R. R. Co., 240 Ill. 238.

dant was negligent in the construction of the scaffold;
that it was defendant's duty to furnish the plaintiff a safe
place to work, and that it failed in this regard, and there-
fore the case should have been submitted to the jury.

Defendant contends that the verdict was properly directed; "first, because the pleadings and proof variety in failure to fix. Gleason was due to the act of working in jumping or stepping down it such a manner as to cause the plank in question to fall; second, that if there were any negligence on the part of any person it was that of a fellow servant of the plaintiff."

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Defendant argues that under the law as above stated, the plaintiff failed to make out a case, in that the evidence indisuptably shows that the scaffold was safe for the purpose for which it was erected, and that the accident would not have occurred but for the negligence of Martine. After a careful consideration of the evidence introduced on behalf of the plaintiff, we are of the opinion that, construing the evidence most favorably to the plaintiff, as under the law we must, there was sufficient evidence from which the jury might, without acting unreasonably in the eye of the law, find that the defendant was negligent in the construction of the scaffold; that such negligence contributed to plaintiff's injury, and that the negligence of Martine, if any, was not the sole cause thereof. The question, therefore, whether the plaintiff was injured by reason of the failure of the defendant to furnish him a safe place in which to work should have been submitted to the jury, and this, even if it be assumed that Martine was a fellow servant of the plaintiff. The duty of the defendant to use reasonable care to furnish plaintiff a safe place in which to do his work is one owing directly by the defendant to the plaintiff, of which it could not divest itself by any delegation to others. C. & A. R. R. Co. v. Scanlan, 170 Ill. 106.

Defendant, however, contends that the rule of law which requires the defendant to furnish the plaintiff a reasonably safe place in which to work does not apply where the servants are creating the place and it becomes dangerous in the course of work. That rule has no application here as the plaintiff had nothing to do with the construction of the scaffold.

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v. Hamilton, 178 Ill. 108.

waived itself by any declaration to others. C. & A. R. Co.

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safe place in which to do its work in any owing diligently

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of hearing, if any, was not the sole cause thereof. The

contributed to plaintiff's injury, and that the negligence

in the construction of the scaffold; that such negligence

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from which the jury might, without acting unreasonably in

cult, as under the law we must, there was sufficient evidence

that, construing the evidence most favorably to the plain-

introduced on behalf of the plaintiff, we are of the opinion

of hearing. After a careful consideration of the evidence

counsel may have observed but for the negligence

for the purpose for which it was erected, and that the

the evidence indisputably shows that the scaffold was not

stated, the plaintiff fails to make out a case, in that

Defendant argues that under the law as above

For the error in giving the peremptory instruction, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

For the error in giving the peremptory instruction, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

76 - 21458

GRATZ B. SMITH,
Defendant in Error,

vs.

DOMINICK MARUBIO, sued as DOMINICK MARUBIO TRANSFER CO., a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 183

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, Gratz B. Smith, sued the defendant, Dominick Marubio, to recover damages sustained by him as a result of a collision of his wagon with the defendant's wagon. The jury returned a verdict in favor of the plaintiff in the sum of $500, upon which judgment was entered, to reverse which this writ of error is prosecuted.

The defendant contends that the judgment should be reversed for the reason that the verdict is against the manifest weight of the evidence.

At the time of the injury, plaintiff was driving an empty one-horse express wagon north in Clinton street and riding with him in the wagon were two other men. Clinton street extends north and south, and there is a single street car track in the center of the roadway, the roadway being about twenty-eight feet in width. The evidence introduced on behalf of the plaintiff tends to show that plaintiff was driving in a walk in the street car track, and immediately in front of his horse and wagon were two or three other teams traveling in the same direction; that a big loaded, staked truck wagon drawn by a team of horses driven by one

CLASS B, MEDIUM.

Reinforced to Class C.

Height 30

Weight, loaded

Wheelbase

Tread

Minimum clearance

Maximum height, steel top

Maximum width, steel top

Minimum turning radius

Maximum grade

Minimum speed

Maximum speed

Maximum length

Maximum width

Maximum height

Minimum weight

Maximum weight

Minimum tire width

Maximum tire width

Minimum tire diameter

Maximum tire diameter

Minimum axle load

Maximum axle load

Minimum number of axles

Maximum number of axles

Minimum number of wheels

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of defendant's drivers was traveling south in Clinton street in the space between the street car track and west curb line of the street; that there was another truck or wagon standing near said curb line; that as defendant's team met the plaintiff, it pulled to the east to pass the wagon or truck standing at the curb, and the plaintiff then drove his horse towards the east to let the defendant pass; that as the defendant passed the wagon or truck standing at the curb his horses were again pulled to the east to get into the street car track behind the plaintiff's wagon, when the hind wheels of plaintiff's and defendant's wagons collided, throwing the plaintiff off his wagon to the pavement and injuring him.

The defendant's version of the matter is that the plaintiff was driving his horse and empty wagon north in the street car track, coming on a trot at the rate of four or five miles per hour; that the defendant was driving south on a slow walk; that the east wheels of his truck were on the east rail of the street car track and his west wheels were west of the west rail; that his wagon or truck was about sixteen feet long, weighed more than two tons, and was carrying a load of about 8000 pounds; that when the plaintiff's horse was about ten feet away, the plaintiff pulled to the east; that the front wheels of his wagon left the street car track but the hind wheels skidded; that the defendant swung his team to the west to avoid being struck by plaintiff's wagon, but the hind wheels of the two vehicles collided, and plaintiff fell off his wagon and was injured; that the defendant's wagon was immediately stopped and the driver went to assist the plaintiff; that a bottle of whisky fell out of plaintiff's pocket on the pavement and was broken;

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medium' and its inner channel of its one committee quality.
its issue to run most to main capital element of Clayton's
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that plaintiff smelled of whisky and appeared to be drunk.

There is a conflict in the testimony and we are unable to say just how the collision occurred. The jury saw and heard the witnesses on the stand, and they were instructed that before the plaintiff could recover, he must prove by a preponderance of the evidence that he was in the exercise of due care for his own safety, and that he was injured as a result of the negligence of the defendant. By their verdict the jury determined these questions in favor of the plaintiff. The trial court also saw and heard the witnesses and entered judgment on the verdict. The jury and the court were in a much better position to determine the true state of facts than we are, and after a careful consideration of all the evidence we cannot say that the verdict is manifestly against the weight of the evidence.

The defendant further contends that the court erred in permitting the two physicians who treated the plaintiff for the injuries received to testify as to the reasonable value of their services. In support of this contention, it is urged that the testimony was improper because plaintiff's statement of claim averred that he had expended certain sums of money, while the evidence showed that he had not paid the physicians but had become liable to do so,-- in other words, that there was a variance between the statement of claim and the proof. After the evidence was introduced the court permitted the plaintiff to amend the statement of claim to correspond with the proof. The contention is clearly without merit.

that distinct emotion it actually was supposed to be
about.

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time

It is next contended that the trial court committed error in refusing to permit defendant's witnesses to answer the question as to whether the plaintiff appeared drunk or sober at the time of the injury. We have carefully examined the record in this regard, and find that the court sustained objections to certain questions on account of form, but did permit the witnesses to testify that the plaintiff appeared to be drunk.

The defendant makes other complaints as to the ruling of the court in refusing to permit witnesses to answer other questions put to them. We have examined the contentions in this regard, and find that the court committed no error.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

86 - 21471

FREDERICK S. McCLORY,
Defendant in Error,

vs.

SARA JOHNSTON TOWNE,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 185

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, Frederick S. McClory, brought suit against the defendant, Sara Johnston Towne, to recover upon a promissory note executed by the latter. The cause was submitted to the court without a jury, and from a judgment of $479.47 in favor of the plaintiff, the defendant prosecutes this writ of error.

The note was executed by the defendant August 16, 1901, due three months after date, to the order of herself and by her endorsed. Defendant's husband testified he and defendant resided in Chicago; that Manie B. Ayres lived with them; that he was a practicing attorney and represented said Manie B. Ayres in certain business transactions; that in 1901 defendant moved to New York where she was to be joined by him and that he was in need of funds and wrote the defendant to execute certain notes and send them to him so that he could have them discounted and obtain the necessary funds; that the defendant executed the notes as requested, including the one in suit, and mailed them to him; that upon receipt of them he placed the note in question in a safety deposit box in Chicago where he kept other papers; that Manie B. Ayres also had a safety deposit box

Jacksonville or Montgomery.

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Dixie to

Dixie Junction.

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Dixie to Dixie

with the same company; that she requested him to permit her to put some of her papers in his box, stating that the one she had was too small; that the request was granted and Manie B. Ayres was given access to his box; that afterwards he removed some of the papers from the box; that he did not recall anything further about the note until about the time of the institution of this suit October 7, 1907; that he never delivered the note to Manie B. Ayres nor to any other person nor authorized anyone else to do so. The evidence tends to show that Manie B. Ayres died intestate October 3, 1902, and letters of administration were issued by the County Court of Coles County, Illinois, October 6, 1902, to James F. Bell; that the note in question was found by the administrator among the effects of Mrs. Ayres in her safety deposit box in Chicago, and was inventoried in her estate as "bad"; that the administrator after investigation, doubted the advisability of bringing suit thereon on account of the then financial condition of the defendant, and on January 9, 1905, the County Court of Coles County ordered the note filed; that it was later ordered turned over to Iona Bourne Bell as heir of said Manie B. Ayres. Subsequently, the administrator and his wife, Iona Bourne Bell, moved to Chicago, and the note in suit was given by the latter to the plaintiff in payment of legal services rendered.

The defendant contends that the plaintiff cannot maintain this suit, as he has failed to show any title to the note. In support of this contention, it is urged that the record in the County Court of Coles County shows that the note was ordered filed in court in accordance with sections 83 and 84, chapter 3, R. S., and that under these sections, the only authority which said Iona Bourne Bell as heir to Manie B. Ayres, deceased, had to institute suit

was to do so in the name of the administrator. No evidence was introduced that Iona Bourne Bell did not receive the note lawfully. For aught that appears, the County Court of Coles County may have ordered it turned over to her as heir of said Manie B. Ayres, deceased, and the presumption will not be indulged that Iona Bourne Bell obtained possession of it unlawfully. Furthermore, a letter to defendant's counsel, which was admitted in evidence without objection, seems to indicate that an order was entered directing that the note be turned over to Iona Bourne Bell as heir of said Manie B. Ayres, deceased. Promissory notes may be distributed in kind by the administrator. Waterman V. Alden, 115 Ill. 83.

The defendant next contends that the note was never delivered. A number of witnesses testified that they knew the defendant's husband and knew his reputation for truth and veracity among his neighbors and the people with whom he did business in Chicago; that his reputation was bad and they would not believe him under oath. There was other evidence that tended to cast some doubt upon the reliability of testimony given on behalf of the defendant. The evidence tends to show that Manie B. Ayres had a safety deposit box of her own as well as having access to the one rented by defendant's husband. Mere possession of a note is prima facie evidence of legal title and right to sue thereon. Woodward V. Donovan, 167 Ill. App. 503. The note having been found by the administrator among the effects of Manie B. Ayres, deceased, the presumption is that she purchased the note before maturity for value in due course of business, and was an innocent holder thereof. Clarke v. Newton, 235 Ill. 530. The burden

of overcoming this presumption was on the defendant, and after a careful consideration of all the evidence, we are unable to say that the finding of the trial court that this burden had not been sustained by the defendant is manifestly against the weight of the evidence.

The defendant further contends that plaintiff's demurrer to her plea of the statute of limitations to the additional count should not have been sustained. In support of this contention, it is argued that the additional count which was filed after the statute had run set up a new and different cause of action from that declared on in the original declaration. Both the original declaration and the additional count declared on the same note. The objection, therefore, is without merit.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

112 - 21507

C. N. COLE, doing business as WESTERN LOAN COMPANY,
Defendant in Error,

vs.

E. E. FULTON CO., a Corp.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 188

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, C. N. Cole, doing business as Western Loan Company, brought suit against the defendant, E. E. Fulton Company, a corporation, on an assignment of wages to him by Joseph H. Fulton, who was in the employ of the defendant. The case was tried before the court without a jury, and a judgment was entered in favor of the plaintiff for $27.00

The defendant contends that the proof fails to show that it had received notice of the assignment; that the evidence in this regard is vague, indefinite, uncertain and insufficient to support the finding of the court that notice was given. The assignment was in writing and at the time it was introduced in evidence, the witness for the plaintiff was asked what, if anything, was done concerning the matter. He replied that the plaintiff filed a notice of the assignment by mail with the defendant company; that the notice was put in an envelope, sealed, stamped, properly addressed, and mailed to the defendant. He further testified that after the notice was mailed he called the defendant on the telephone and talked to a person who said his name was R. H. Fulton; that he asked Fulton what the defendant intended to do in re-

5. D. CECIL, acting Secretary of
Secretary Cecil Crowley.

Delivered in Person.

Dated 21

ss.

5. D. JUSTICE CO.'s Office.

Delivered in Street.

ex. Solicitor

20 JAN 1888

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Plaintiff, U. S. Dist. Judge Sanborn on Contempt
Case Ordered, Attorney Gen. Garland for Defendant, U. S. Dist
Counsel, a Solicitation, ed as Appointment of Lawyer to Aid Sp
Special U. Prison, Not Due to the Subpoena of the Defendant. C
Case Was Tried before the Court without a Jury, and a Judg-
ment was Ordered in favor of the Plaintiff for $127.

The defendant contends that the Penal Code is
void Since it has Invaded Section of the Constitution; that Con
gress Is Also Judged in Error, Incivility, Humanity and
Humiliated to Enforce the Finding of the Court that Carries
any Grave. The Punishment was to Extend and at the time
it was Instituted to Autocrats, the Citizen Get the Identity
the Entire Body, It Exhibits, was Once Consecrated the Author.
It Settled That the Plaintiff Lived a Notice of the Meeting
be Held at Salt Lake the Court Commons Assembly; that the Action was
Not to Omit also the Statement Assembly; that the Action was
Not Is an Association, Convened, Expended, Particularly Instituted, and
Being to Omit also the Statement Assembly; that the Action was
Written in the Statement. He Further Specifies that After the
Motion Was Waived to Bind the Statement on the Injunction
Case Before Justice Mary Ann Bell Left Hand Was S. D. Lyford
Not Given to a Person Who Bell Left Hand Was S. D. Lyford
that He Knows Justice Mary Ann Bell Left Hand Was S. D. Lyford

gard to the notice of assignment of wages; that Fulton stated th the defendant would not recognize the assignment, and that if plaintiff wanted his money he would have to get it from Joseph Fulton who executed the assignment or start suit against the defendant. This conversation was denied in toto by R. H. Fulton, and evidence was introduced on behalf of the defendant tending to show that no notice of the assignment was received by it. The defendant now argues that "no testimony was offered to show the contents of the letter. No attempt was made to prove whether the so-called notice of assignment was a notice or not. The only testimony which tended to show that it was a sufficient notice was the conclusion of the witness that it was a notice of assignment. No testimony was offered by plaintiff to show that the notice was ever received". This wasnot the objection urged on the trial of the case. When the witness testified that he mailed a notice of the assignment to the defendant no objection was made that the answer was a conclusion of the witness, or that the contents of the notice were not shown. In fact no objection was made and at no time was the court's attention called to the fact that the contents of the notice were not given. If the objection now urged had been made on the trial, the witness could have been further interrogated concerning the contents of the notice. As the objection was not there made, the contention cannot be maintained. In the case of Coffeen Coal and Copper Co. v. Barry, 55 Ill. App. 537, the court said: "Had proper objection been made so that the court could have known the ground thereof, no doubt such action would have been taken as to have removed all just cause of complaint." See also First National Bank of Hayward, Wis. v. Gerry, et al., 195 Ill. App. 513.

The defendant further contends that, even if the plaintiff had notified R. H. Fulton of the assignment, this would not be sufficient, without further proof that said Fulton was the duly authorized agent of the defendant in this regard. The evidence tends to show that said R. H. Fulton was vice-president and secretary of the defendant, and the president of the company testified that in his absence all mail was opened by him. We are of the opinion that the evidence was sufficient to establish the agency of R. H. Fulton.

The defendant also contends that its motion in arrest of judgment should have been sustained, for the reason that there was a variance between the praecipe and summons on the one hand, and the amended statement of claim on the other, in that the praecipe and summons named Elmer E. Fulton, Ralph H. Fulton and Leroy M. Fulton, doing business as E. E. Fulton & Co. as defendants, while the amended statement of claim named E. E. Fulton Company, a corporation, as defendant. After the praecipe, summons and original statement of claim were filed, the defendant entered its appearance as a corporation. Subsequently the plaintiff filed an amended statement of claim against it as such, to which the defendant filed an affidavit of merits. The contention is purely technical and without merit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

384 - 21371

FRANK KINSHKOWSKI,
Appellee,
vs.
HARRY BOSTROM,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

202 I.A. 189

MR. JUSTICE GOODWIN delivered the opinion of the court.

By this appeal it is sought to reverse a judgment against appellant for $730, entered in the County Court on a directed verdict in an action of debt. The appellee, who is hereinafter referred to as plaintiff, declared upon an appeal bond in the penal sum of $1,000, which recited that plaintiff had recovered a judgment against appellant, who is hereinafter referred to as defendant, for $700 and costs in the Circuit Court, and had prayed an appeal to the Appellate Court, and that if he should prosecute his appeal with effect, and moreover pay the amount of the said judgment, costs, interests and damages rendered and to be rendered against him, in case the said judgment should be affirmed in the Appellate Court, the obligation was to be void. Plaintiff alleged, however, that the judgment mentioned in the bond was affirmed, and that he was awarded $16.90 as costs, and alleged in breach of the bond that he had not paid to plaintiff the amount of said judgment and interest thereon, and the costs last aforesaid, or any part of the same, etc.

The defendant filed four pleas; the first, a plea of payment of the "amount due by reason of said

writing obligatory as agreed between the said plaintiff and the said defendant," etc. the second, a release by deed, the third, that defendant paid the plaintiff the sum of $150 and other valuable considerations in full satisfaction and discharge of said several promises, and fourth, a plea that plaintiff was not damaged, etc. Demurrers to these pleas were sustained; thereupon the defendant filed four additional pleas. In the first it is alleged that while the suit for which the appeal bond was given was still pending on appeal, the defendant paid to the plaintiff $150, and that in consideration thereof, plaintiff released and satisfied all his right, title and interest in and to the said judgment, executed a certain instrument in writing commonly called a satisfaction piece, by which he released and satisfied the said judgment, that said instrument was filed, and that the clerk of the Circuit Court satisfied said judgment of record. In his second additional plea these facts were restated with somewhat greater particularity, and similarly in the third plea, while the fourth set up an assignment of the judgment. General and special demurrers to the three additional pleas were sustained, and issue was joined on the fourth plea. Upon the trial of the issue so joined, plaintiff offered the bond in evidence, and rested without proving any breach, and defendant offered evidence which the court apparently deemed insufficient to establish the alleged assignment. The court thereupon directed the jury to return a judgment in favor of the plaintiff for $1,000 and $730 damages, and entered a judgment in the usual form for the amount, to be discharged upon the damages.

Defendant assigns as error, the action of

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жерлерде өте өткір болды. Осы жылдары, әсіресе, ауылдық
жерлерде ауыл шаруашылығын ұжымдастыру кезінде
көптеген адамдар өз жерлерін тастап кетуге мәжбүр
болды. Олардың көп бөлігі қалаларға және басқа
аудандарға қоныс аударды. Бұл процесс ауыл
шаруашылығын ұжымдастыру кезінде ерекше
қарқынмен жүрді. Мысалы, 1929 жылы ауыл
шаруашылығын ұжымдастыру кезінде 1 миллионнан
астам адам ауылдан кетіп қалған. Бұл көші-қон
ауылдық жерлерде халықтың азаюына әкелді.

the court in sustaining the demurrers to his several pleas of accord and satisfaction, release, etc., and in directing a verdict and entering judgment thereon. Upon the question of the sufficiency of the pleas, the court is of the opinion that they set up a valid defense in so far as the action on the bond was predicated upon a failure to pay the judgment appealed from. The pleas set out with great particularity that an appeal had been taken, and while it was pending, the plaintiff agreed to discharge, and did discharge, the obligation in consideration of the immediate payment of the sum of $150. Defendant was not obliged to pay plaintiff in any event until the appeal was disposed of; consequently, the immediate payment of a lesser sum constituted a sufficient consideration for the release of the judgment appealed from. Precisely the same question arose in Donahue v. Brooks, 143 Ill. App. 188, where a judgment was recovered for $95.00, and after an appeal had been taken to the Appellate Court, the appellant agreed to, and did, accept $40.00 in cash in full settlement of his claim. In sustaining a judgment in favor of the debtor in a suit for the balance, the court said at page 190:

> "It is undoubtedly the rule, as contended by plaintiff in error and as announced in Martin v. White, 40 Ill. App. 281, and Heintz v. Pratt, 54 Ill. App. 616, that 'A payment of a lesser sum will not discharge a debt of a greater sum, without some additional compensation.' Yet it is also well settled that where the creditor receives anything of benefit to himself, that he would not otherwise have had, together with a payment of a lesser sum, there may be an accord and satisfaction. Titsworth v. Hyde, 54 Ill. 389; Curtiss v. Martin, 20 Ill. 555.
>
> "In the case before us the evidence shows that there was an agreement upon the part of May, acting for Brooks, to abandon the appeal, the right to which had been fixed by the court on the day before Douglass and May made the settlement and that the cash payment to Douglass agreed upon should be made at once. Pursuant to this agreement between Douglass and May, May paid Douglass the forty dollars on the sixth day of January, 1906, thirty-nine days before Douglass

could otherwise have obtained the money upon the judgment."

Plaintiff contends, however, that the demurrers were properly sustained because the pleas did not answer the entire demand. Actions in debt on bonds are anomalous in that while there is, in theory, but one cause of action, several breaches are alleged, each of which, when proven, results in a judgment in favor of the plaintiff for exactly the same amount, namely, the penalty, with the illogical addenda of the amount of damages established in connection with the breach. For very practical reasons, therefore, the law treats each allegation of breach as a separate count, and in that aspect of the case, the failure to pay the $700.00 judgment and interest constituted one breach, and the failure to pay the judgment for costs in the Appellate Court constituted another. The pleas filed fully answered the first, and, in view of the fact that this first breach was in reality the substance of the action, while the second constituted but an inconsiderable item, we are of the opinion that the court should have sustained the plea as a plea to the declaration so far as it counted upon a failure to pay the original judgment.

The judgment of the County Court is reversed and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

S - 21050

FRANK A. HOBBS,
For use of Julius Limbach,

Defendant in Error,

vs.

OSCAR C. JUNGE,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 191

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 7, 1914, defendant in error, Frank A. Hobbs, for use of Julius Limbach (hereinafter called plaintiff) began suit in the Municipal Court of Chicago, against Oscar C. Junge, plaintiff in error (hereinafter called defendant) on a written contract which provided for the payment of the sum of $500.00 as a real estate commission. The plaintiff in the lower court recovered judgment for the full amount and the case now comes before us on a writ of error.

The evidence shows that the plaintiff and defendant, on April 14, 1914, entered into the following written agreement:

"April 14, 1914.

Article of agreement by and between O. C. Junge and F. A. Hobbs & Company. It is hereby agreed by F. A. Hobbs & Company that they are to receive a commission for consummating the Sale of property known and described by #1133 North Shore Avenue, of five hundred dollars ($500.00). It is further agreed and understood that O. C. Junge is to receive a sale price of twenty-five thousand dollars ($25,000.00) net to him. Deal to be consummated on or before May 1, 1914.

Signed O. C. Junge."

E - 18200 -

Miss A. Noble,
Box 100 Mt Pilot Station,

Alaska.

Dear Miss Noble:

Referring to Order, 18200 to
Messrs. Clay
Miller & Co.
Bankers
Seattle, Wash.

Subject to rules printed on the back hereof, we
purchase for the account of the Seattle-First National Bank
the following described Bonds and Securities at 98.125
and accrued interest, as listed below:

($5000.00). 15 Ex Fortune Mining and Manufacturing
Bonds, 6%, Dated Jan. 1, 1924, Due Jan. 1, 1944,
Coupons Jan. & July, Nos. 1 to 30 inclusive.
($5000.00). 15 Ex Fortune Mining and Manufacturing
Bonds, 6%, Dated Jan. 1, 1924, Due Jan. 1, 1944,
Coupons Jan. & July, Nos. 31 to 60 inclusive.

Please deliver to us the above bonds at Seattle
against payment of $9812.50 plus accrued interest to
date of delivery and charge our account for $19.63
Seattle Exchange stamps, at time purchased (10000.00).

Yours very truly,

Clay Miller & Co.

By [illegible]

Seattle, Wash.
January 14, 1924.

Referring to Order No. 18200 we have this day
purchased for the account of the Seattle-First National
Bank, Seattle, for use of Pilot Station (Incorporated)
Alaska, the following described Bonds and Securities at
98.125 and accrued interest:

($5000.00). 15 Ex Fortune Mining and Manufacturing
Bonds, 6%, Dated Jan. 1, 1924, Due Jan. 1, 1944,
Coupons Jan. & July, Nos. 1 to 30 inclusive.
($5000.00). 15 Ex Fortune Mining and Manufacturing
Bonds, 6%, Dated Jan. 1, 1924, Due Jan. 1, 1944,
Coupons Jan. & July, Nos. 31 to 60 inclusive.

Please deliver to us the above bonds at Seattle
against payment of $9812.50 plus accrued interest to
date of delivery and charge our account for $19.63
Seattle Exchange stamps, at time purchased (10000.00).

Yours very truly,

Clay Miller & Co.

By [illegible]

Miss A. Noble,
Box 100 Mt Pilot Station,

Alaska.

Dear Miss Noble:

Referring to Order, 18200 to
Messrs. Clay
Miller & Co.
Bankers
Seattle, Wash.

Subject to rules printed on the back hereof, we
purchase for the account of the Seattle-First National Bank
the following described Bonds and Securities at 98.125
and accrued interest, as listed below:

($5000.00). 15 Ex Fortune Mining and Manufacturing
Bonds, 6%, Dated Jan. 1, 1924, Due Jan. 1, 1944,
Coupons Jan. & July, Nos. 1 to 30 inclusive.
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Coupons Jan. & July, Nos. 31 to 60 inclusive.

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date of delivery and charge our account for $19.63
Seattle Exchange stamps, at time purchased (10000.00).

Yours very truly,

Clay Miller & Co.

By [illegible]

Seattle, Wash.
January 14, 1924.

Referring to Order No. 18200 we have this day
purchased for the account of the Seattle-First National
Bank, Seattle, for use of Pilot Station (Incorporated)
Alaska, the following described Bonds and Securities at
98.125 and accrued interest:

The evidence further shows that after C. C. Junge employed the plaintiff as a real estate agent to sell the premises set forth in the above mentioned commission contract; that the plaintiff obtained a purchaser, one Marie Thilo, who entered into a written contract to purchase the premises in question from C. C. Junge for $25,500.00. According to the terms of that contract, the purchaser agreed to pay $1,000.00 down as earnest money; to assume a trust deed to secure an indebtedness of $11,000.00, and pay the balance of $13,500.00 (the extra $500.00 is not specifically explained) at the office of the Chicago Title and Trust Company five days after the title had been examined. It is not disputed that the purchaser paid the $1,000.00 earnest money and was ready and willing to carry out the terms of the contract. After the contract of purchase and sale was made, it, together with the $1,000.00 earnest money was deposited, on April 14, 1914, in escrow with the Chicago Title and Trust Company.

The defendant contends that the allegations in the statement of claim and the proofs do not correspond; that is, that the statement of claim made in the lower court which recites: "for commissions for services of the complainant a licensed real estate broker in Chicago, performed for the defendant at his special instance and request in and about a certain contract of sale negotiated by the plaintiff for the defendant of the premises commonly known as 1133 North Shore Ave., Rogers Park, Ill., which amount of $500.00 is the reasonable usual and customary commission for such services so performed by plaintiff and as established by the rules of the Chicago RealEstate Board of which plaintiff was then and there a member," does not accord with the proof, that is, with the written contract above mentioned, dated

April 14, 1914, which provided for $500.00 as commissions.

The plaintiff's statement of claim which is for commissions for services rendered the defendant in and about a certain contract of sale negotiated by the plaintiff for the defendant, certainly lays a proper foundation for the above mentioned written agreement of April 14, 1914, which provides for the payment of a commission of $500.00 for consummating a sale. It is true that in the statement of claim plaintiff recites that $500.00 is the reasonable, usual and customary commission for such services, but after the plaintiff had put in evidence the written contract, it became unnecessary for the plaintiff to prove that $500.00 was a reasonable, usual and customary commission.

It is further contended by the defendant that a condition precedent to recovery by the plaintiff was that the sale should be consummated, and that defendant should receive $35,000.00. The evidence, however, shows that the plaintiff obtained a purchaser who signed a binding contract and deposited $1,000.00 earnest money, and thus complied with the requirements of the commission contract. When the plaintiff, by his efforts, brought into being the binding written contract between the defendant and the purchaser, he completed in full his part of the commission contract and had earned and was entitled to the $500.00. In the case of Mignault v. Gunther, 171 Ill. App. 311, the court says on page 316:

> "Where it is an express condition to the payment of commissions that the sale be made, our Supreme Court holds that a binding contract of sale must be entered into between the owner and the proposed purchaser before any commissions are earned. In some states it is held that the commission is not earned until an actual

April 14, 1914, which provided for $500.00 per month.

The plaintiff's statement of claim sets up for

[illegible] the plaintiff to recover the sum of $500.00 and interest thereon from the 14th day of April, 1914, for the said monthly payments.

The defendant's statement of defence admits the making of the said agreement, alleges that the plaintiff was not ready, willing and able to perform the said agreement, and denies that the plaintiff is entitled to recover the said $500.00 or any part thereof.

It is further contended by the defendant that the plaintiff has not suffered any damage by the alleged non-performance of the said agreement, and that plaintiff should not be entitled to recover more than nominal damages.

The evidence, however, shows that the plaintiff expended a considerable sum of money in erecting a building upon the said property, and was compelled to expend $1,000.00 thereby, and then complied with the requirements of the corporation counsel. Even the plaintiff, by his witness, brought into being the binding written contract between the defendant and the purchaser, to be completed in full by the commission contract and the purchaser, and that deposit was applied to the $500.00. In the case of Edgecomb v. Dunning, 137 Ill. App. 511, the court says on page 518:

> "There is in an express condition in the [illegible] of contracts that time must be held to be material, and the complainant [illegible] and compliance one claiming. In some states it is held that time is not material unless [illegible] that time must be material into [illegible] the [illegible] and the [illegible] [illegible] and [illegible] [illegible] [illegible]

conveyance of the property is made, or where applied to a lease, an actual execution of a lease.

"The Supreme Court of this state has not gone to that extent, however, but lays down the rule clearly that a binding contract of sale must be entered into. (Wilson v. Mason, 158 Ill. 304; Fox v. Ryan, 240 Ill. 391.)"

In the latter case, which was one of prospective lessor and lessee, the real estate agent brought the parties together, but the matter still remained in the form of negotiations; and the court said, "Had a lease been executed or had a valid contract to execute a lease been entered into between the parties, the plaintiff would have been entitled to commissions."

It is contended by the defendant that because the plaintiff in the statement of claim set forth that the compensation asked for was the commission established by the rules of the Chicago Real Estate Board, he should have put in evidence to that effect. Inasmuch, however, as the plaintiff recovered on a written contract which provided for an express amount as a commission, it was unnecessary for him to prove that the amount was computed in accordance with the rules of the Chicago Real Estate Board, or that the amount was reasonable.

Finding no error in the record we are of the opinion that the judgment should be affirmed.

AFFIRMED.

"The Supreme Court of California has not
ruled in a long, or recent succession of a house.
undermining of the property is main, or where ex-

Use Of Water. 400 111. 401."

be material rule. (Citing E. Owner. 109 111. 304;
have already that a diverted contract of main some
face is that effect. However, the line down the

In the latter case, which was of precipitate
lapsed and lawful, the real matter which permits the parties
ecessor, but the matter still continues to the lack of
ubstitutions; but the newly said. "But a lease does expound
er had a will contract to because a lease that entered
time passed the parties, but lessees might not a have been
ualified to occasions."

It is inherent in the relations that because
the tenancies expel its man the occasions entitled
of the notice of the Illinois that Service Board, he should
me but in calling to that clerk. However, because,
e the District considered in a matter different which
broaching for an opinion passed as a committee. It was
ntended with the rules of the Chicago that the lease and contract
ssachusetts for to prove that the notice was
ERAL, or that the owners was insufficient.

Effect on error in the claims as one of the
ollows that the judgment should be affirmed.

Judgment on error in the claims as one of the

25 - 21243

POOLEY - HERCZ COMPANY,
a Corporation,
Defendant in Error,

vs.

GREENE'S LIMITED,
a Corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 192

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 14, 1914, defendant in error (hereinafter called the plaintiff) brought suit against plaintiff in error (hereinafter called defendant) for the sum of $250.00 for architectural work in and about preparing preliminary sketches and working drawings, plans and specifications, at the special instance and request of the said defendant.

In his affidavit of merits defendant denied that he ordered the work done and also alleged that the work was not worth the sum of $250.00.

On January 12, 1915, the lower court found the issues against the defendant and, on January 16, 1915, entered a judgment against the defendant in favor of the plaintiff, in the sum of $250.00. The matter now comes before us on a writ of error. The substantial question in the case is whether the defendant is liable for the making of certain plans and scale drawings which were delivered to and retained by the defendant.

Plaintiff's evidence is to the effect that the defendant told the plaintiff to go ahead and get out the plans and scale drawings and that it did so and delivered

[illegible]

[illegible]

[illegible]

them to the defendant. The defendant's evidence is to the effect that the plaintiff offered to submit preliminary sketches for the work and would so do without charge; that plaintiff did submit preliminary sketches and that then the defendant told the plaintiff that as the actual cost could not be ascertained unless plans and scale drawings were made, the defendant told plaintiff to prepare the plans and scale drawings; that thereafter the plaintiff did submit the plans and scale drawings; that the defendant told the plaintiff he would talk the matter over with his partners and, after that, had no further communication with the plaintiff.

The evidence shows that it is not the custom for contractors to make and charge for preliminary sketches if the same are not accepted, but that it is not the custom for architects to prepare plans, scale drawings and details without charge.

It is not disputed by defendant that he received the plans and scale drawings made by the plaintiff and that they were not returned to the plaintiff. Although there is obvious conflict between the testimony of Herez, who testified for the plaintiff, and Greene, who testified for the defendant, the testimony of the plaintiff's witness is strongly corroborated by the fact that the plans and scale drawings were not only made at the suggestion of Herez, who acted for the defendant, but subsequently delivered to the defendant company and by it retained. We are of the opinion that the evidence justifies the judgment.

The charge of $250.00, which was made by the plain-

tiff for the work done, was only one half the customary charge of five per cent on the estimated cost of the work and was, therefore, reasonable.

The judgment of the court below is affirmed.

AFFIRMED.

still for the work done, was only one half the customary charge
of five per cent on the estimated cost of the work and was,
therefore, reasonable.

The judgment of the court below is affirmed.

AFFIRMED.

406 - 21393

PATRICK GARRITY,
Appellee,

vs.

W. J. NEWMAN & COMPANY, ET AL (On Appeal of THOMPSON STARRETT COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 194

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action for damages for personal injuries. It was brought by appellee, hereinafter called the plaintiff, against W. J. Newman Co. and the appellant, Thompson Starrett Co., hereinafter called the defendant.

In the lower court the plaintiff obtained a verdict for $2500.00 against both the defendants; but after judgment the defendant, W. J. Newman Co., was dismissed out of the case and the court rendered judgment on the verdict against the defendant, Thompson Starrett Co., and from this judgment an appeal was taken to this court.

The plaintiff was employed by the defendant, W. J. Newman Co., as a laborer, to help in the construction of wells and caissons for the erection of the Insurance Exchange Building at Sherman street and Jackson boulevard in Chicago; his particular work being the dumping of buckets as they came up in the wells or caissons. His hours were from four p.m. until midnight, and at the time of the injury, on July 31, 1911, he had been at work there for six or seven days. On the day in question he went to work at four p.m. and when it grew dark he worked by the aid of

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Mr. Sterling Fleming entertained the opinion of the
owners.

Time is an option for showings for personal in-
terest. It was brought by applicant, International United
Corp. (Delaware), applicant B, 2. Shares do. and the holders.
Stephen Emmerich Or., international matters for defendant.

In the lower court the plaintiff obtained a
verdict for $3000.00 against both the defendants; the
other judgment the defendant, F. 2. Shares Or., was dis-
missed out of the case and the court sentenced judgment as
to the defendant, Thompson Electric Co.,
and time also judgment in support was given to this court.

The plaintiff had complied by the directions.
F. 2. Shares Co., as a lumber, it only is the construction
of metal and machine for the creation of the foundation
Commerce Building of Common stocks and Indiana Automobile
Co Chamber; his permanent work during the duration of Wisconsin
Time Zone. until adjusted, and at the time of the in-
ry that case is not the basis or reference. His books
July. on July 21, 1917, he just have at most three per cent
is eight days. In the suit is connection be sent in order of
Time Zone. now when it shall take in writing by the act of

Respectfully submitted,
Commerce Commission,
By J. Stanley C. Chester,
Its Attorney in Charge.

Approved:
Examiner Joseph Sterling.

Action ordered,
Commissioner Thomas,
Commissioner Irvine.

acetylene torches and electric light.

On July 31, 1911, the night of the accident, he was working at the basement level near the Sherman street side of the building. About fifty feet south of the place he was working, there was a concrete mixer. A plank roadway entered the basement from Sherman street; extended west some distance, then turned south toward the concrete mixer, then east up to the level of Sherman street. The plank roadway just mentioned, was used by teams for hauling out the earth which was brought up from the wells and also for taking concrete to fill the wells or caissons.

The particular well on which the plaintiff was working on July 31, 1911, was within the area bounded by the roadway, and about twenty-five to thirty feet east of the west side of the roadway. The excavation for the building was bounded on the east by Sherman street, on the north by Jackson boulevard, on the west by Fifth avenue and on the south by a line drawn east and west half a block south from Jackson boulevard. Thompson Starrett Company had the general contract for the construction of the building and put up the structural iron work.

In the middle of the building, some structural steel, erected by Thompson and Starrett's men was up as high as the third or fourth floor. The structural iron workers, who were Thompson and Starrett's employees, worked during the day, ending their day's work at 4:30 p.m. and they had been at work on the premises the day of the accident. The surface of the basement at the level of and in the neighborhood of the wells was rough and uneven and strewn with the debris arising by reason of construction

conditions involving such questions arise.

On July 12, 1917, the Board of the Institute,
by vote passed by the Executive Committee under the powers
given to that Committee, there was a resolution adopted
to grant an extra month's vacation to all members of the
Faculty who had been in the service of the Institute for
five years or more continuously, some extra leave for ten
years' service, and a sabbatical year for twenty years'
service. The question of the treatment of time in
such connections as this arises very frequently and
often. The problem is made difficult by the fact that
during the day, ending about one-half to one hour after
sunset, varying in length and position with the season and
with the latitude of the locality, some astronomical
observation is usually possible. The astronomical time
of beginning and ending twilight is easily computed, but
the practical value of the definition is somewhat vague
and depends on the brightness of the stars observed and
the sensitiveness of the eye. Twilight lasts for six hours
at the equator, but only three-fifths as much when the sun
is overhead on June 21st, 1917, one station for which
observations were made for the purpose of determining
time for twilight or morning.

The Nautical Almanac will be found the convenient one
for ordinary purposes, and where the observer is at a
considerable distance from Greenwich, some account must
be taken of the longitude. Even when he is at the place
for which the Almanac is computed, there are a number of
questions which arise. Shall we use Standard Time or
Local Time? Shall we use the time of sunset or the time
when the sun's center is on the horizon? In the tropics
twilight is very short, and the latter is the more
convenient, but in higher latitudes the former is used.
Shall we use the time of the beginning or the end of
twilight? Shall we use the time when the sun's center is
on the horizon or when it is 18° below the horizon?
Shall we use the time when the sun's center is on the
horizon or when the upper limb is on the horizon? Shall
we use the time when the sun's center is on the horizon
or when the upper limb is on the horizon? Shall we use
the time when the sun's center is on the horizon or when
the upper limb is on the horizon? Shall we use the time
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limb is on the horizon? Shall we use the time when the
sun's center is on the horizon or when the upper limb is
on the horizon? Shall we use the time when the sun's
center is on the horizon or when the upper limb is on the
horizon? Shall we use the time when the sun's center is
on the horizon or when the upper limb is on the horizon?

operations. The wells were from six to seven feet in diameter and were filled either part of the way up or entirely with concrete; on the concrete, steel shoes were placed, and on them steel columns about two feet square were erected.

Inasmuch as in the central area, which was about 70 feet square, (the general excavation being over 200 feet square) there was to be a boiler and engine room in a sub-basement, below the regular basement, the top of the concrete in about sixteen wells in that central part was about fourteen feet below the surface of the general excavation.

For the convenience of the workmen a toilet had been built under the Fifth avenue sidewalk at the southwest corner of the excavation. There was an improvised walk leading from the roadway which ran east and west along the south side of the excavation to within a plank's length of the toilet; it was composed of single or double planks laid on the ground to keep the workmen out of the mud. About ten feet south of the walk there was a string of electric lights. These were, on the night in question, the only lights in the basement except those in that part of the excavation where the plaintiff worked. The basement elsewhere was dark.

About 9:30 p.m., the night of the accident, the plaintiff left his work and started in a west by south direction to go to the toilet. He had been told where it was but had never been there before. It was a dark night and the central area as stated above was without artificial light. After he had gone some distance on his way to the toilet he fell into one of the holes or wells of the central area, one in which a steel column had been placed,

and was injured. Some of the workmen heard his groans and went to him and found he had fallen down 15 or 16 feet into one of the wells which had been left, by the defendant, uncovered. The evidence shows that about eight wells out of the sixteen in the central area, had steel columns placed in them by the defendant and had been left by them open and uncovered.

These particular wells after being dug by Newman & Company, plaintiff's employer, had all been covered by that company with substantial planking. The structural steel was put up by the defendant, and to do that work the defendant uncovered the wells and after the steel uprights were set, or placed in them, still left them open and uncovered. The evidence does not show affirmatively that the plaintiff had any knowledge or notice that the wells referred to were unprotected and uncovered; but it does show that he had never been in that part of the basement before.

The record does not show exactly which of the wells in the central area plaintiff fell into, but the witnesses who helped get him out, describe it as being between 100 and 150 feet from where he had been working, and as being near the center of the building.

The plaintiff suffered a fracture of the fibula of the right leg; and a cut in the left arm. From the well where he was injured he was taken to the Eye and Ear Hospital where his arm was sewed up and a cast put on his right leg. Six months elapsed before he was able to be out of bed; after that he was on crutches for about six months. He did not go to work for about a year and two or three months. The right foot at the time of the trial was much enfeebled, bein

by that company.

Those particular units also being due by Dawson & Company, practically outright, they all have currency at the end of the trying war years. The situation already existing, and to do that each the declaration announced the policy was after the steel capitals were set, or placed in town, still just like the rest operations. The extension was not some alternatively when the Electric and any power edge to mention that the policy remained to more unprotected and insecurity; but it never once that he had never been in that part of the Dominion Uniform.

The reports have not been readily which at the policy is the modified term plentifully just then. But the alternative are helped for the end. Somewhere it an noted mentioned 200 and 280 feet that above he had been waiting, and we heard here the events of the Building.

The Electric maintained a Insurance at the Library of the rotten log end a not in the left wing. When the wall stone be now to maintain the steel the city not be of their monthly. Its for the right look at the time of the trying war years' period to work for. Spent a short end the of their months. The [illegible] to be made not those on the first filling deed 24 or 10 may have intended. Those at the weakened loaded the stones

as the plaintiff testified "stiff all the way through". Evidently, as a result of the fall, the use of the foot is permanently and seriously impaired.

The defendant contends that the declaration does not state a cause of action; to be more specific, that the declaration does not charge it with any duty. The declaration as drawn obviously was intended to charge both W. J. Newman Co. and the defendant with responsibility, and when, between verdict and judgment, the W. J. Newman Co. was dismissed out of the case, it became a charge against the defendant (Thompson Starrett Company) alone. It is accordingly ambiguous and the question arises whether, as to the remaining defendant, it contains allegations sufficient to make out a case of actionable negligence, and a case that is consistent with the evidence. Upon analysis, we find the declaration contains the following averments; that the defendant was in the contracting business and was engaged in constructing a certain large building and structure in the City of Chicago; that the plaintiff was employed by the W. J. Newman Co.; that defendant knew the plaintiff worked in the night time about the wells which were being dug for the purpose of building the foundation of the building; that the defendant carelessly and negligently failed and neglected to exercise ordinary care for the safety and welfare of the plaintiff, but negligently permitted divers of said wells to be and remain exposed, unprotected and unguarded so that persons working at and about the same were liable at all times to fall into said wells; that defendant had notice or by ordinary care would have had notice of the danger; that plaintiff did not have notice and was not chargeable with notice; that while plaintiff was doing his duty

to consequently are «relevant» theories.

The distinction between the declarative
sense and other senses of relation; so he says somewhere,
that the sentences does not change at all and only
the indications as these objectively are intended in sentences
have a. A. Kreibig in. and his. Unterschied zwischen Gegenstand
und Sache, Leipzig 1904 and the Imagination, also E. Z. Kreibig in.
die Elemente und ihr Sein, Z. f. Psychol. u. Physiol. Sinnesorg.
the reference [Lemmonen Bibliography] above. It is
remarkably unfortunate and the existing other theories, as
to the preceding statement, it requires discrimination suffi-
ciently to which not a case of relationship negligence, and a
more that it considered all the interest. Then analysis,
we find the indistinction condition for fulfilling statements;
that the statement not is the unwarranted sentences can not
neglect in consideration a general judgment existence
made in the light of different; that the Gestaltist one neglected
by the N. Z. Kreibig in.; that sentiments among the Gestaltist
assume in the night time about the notion which were having
that the the question of including the formulation of the Gestalt
that that the intentional particularly one negligently failed
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Gestalt; that Gestalt its the true notion not the notion

and was at work there and in the exercise of ordinary care, he, by reason of the carelessness and negligence of the defendant, fell into one of the wells and thereby was injured.

It is not necessary for a plaintiff in such a case as this to set forth in his declaration in express words the particular principle of law which gives rise to the obligation on the defendant; it is enough if sufficient facts are stated from which the law will imply a duty. We are of the opinion that the declaration sets forth sufficient facts to constitute a cause of action.

The defendant contends that it was not under obligation to guard or protect the well into which the plaintiff fell. In Variety Mfg. Co. v. Landaker, 129 Ill. App. 630, the court says:

> "A contractor whose servants are engaged upon work about which the servants of another are also engaged, owes the servant of such other contractor the duty of ordinary care in prosecuting its work."

The law required the defendant to exercise ordinary care for the safety of the plaintiff; and it can not be said that the defendant when it left the well, into which plaintiff fell, open and unguarded, knowing at the time of plaintiff's employment in that neighborhood, fulfilled its legal obligation or performed its duty. Upon a careful examination of the facts as shown by the evidence we are of the opinion that it was the duty of the defendant to guard or protect the wells in which it had set steel uprights and of which it had taken possession for that purpose; and that when it failed to guard or protect them it was guilty of negligence.

are built of materials.

Howell can just about be fitted in: Howard at Jarrett Cove it
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The defendant contends that the plaintiff not only failed to prove that he exercised ordinary care, but that he has affirmatively proved that he was negligent and that his negligence was the proximate cause of his injury. The evidence shows that it was customary to cover such wells after they were dug; so that there was nothing extraordinary in the fact that the plaintiff started off, from the place where he was working, in a general southwesterly direction to the toilet. He was entitled to take in a general way the shortest route and was not supposed to start out on the presumption that the defendant had been negligent and left any wells unguarded. There was nothing abnormal in plaintiff's conduct. He had a right to go as he went, and without evidence to the contrary, the presumption is that he was careful. Without the negligence of the defendant there could have been no fall and no injury. The fall and the injury were not the probable consequence of plaintiff's conduct, but an independent result arising entirely by reason of the negligence of the defendant.

As to the defendant's criticism of instruction number three; the words "the servants of one contractor owe to the servants of the other contractor the duty of exercising ordinary care" are just as applicable when the negligence consists of the omission of an act as they are when the negligence consists of the commission of an act. Barryman Vs. C.C. Ry. 242 Ill. 269.

The objection to instruction number four is untenable. As to instructions number 45 and 47, they are not based on the facts shown by the evidence, nor upon the law as above set forth. Instruction 47 is not the equivalent of instruction number 23.

of instruction number 69.

Construction of the contingent remainder rule. Suppose a testator devises property to A for life, remainder to B if B survives A, and then dies without issue. Construction of the contingent remainder rule depends on the intent of the testator. In a testamentary instrument, it is presumed that the testator intended that the property should pass to B's issue rather than to his own heirs. Thus, B's interest is contingent upon his surviving A and dying without issue. If B predeceases A, his interest is destroyed and the property passes to his issue. If B survives A, his interest vests and the property passes to his own heirs. Under the rule

Inasmuch as the evidence shows that the plaintiff's injury resulted in a serious and permanent injury to his right foot, the damages are certainly not excessive. We find no error in the record which justifies a reversal. The judgment is affirmed.

AFFIRMED.

Insurance on the equipment means that the district
replaces lumber in a decision not personnel injury to the
right knee. The minutes are submitted and accepted. An
item be added to the school which furnishes a summary.
The finances to William.

William.

21467

196 - ~~21467~~

DAVID BRAVERMAN,
Defendant in Error,

vs.

MORRIS BORDACOV,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 196

MR. JUSTICE TAYLOR delivered the opinion of the court:

This is a suit which was brought in the Municipal court by David Braverman, defendant in error, (hereinafter designated plaintiff) against Morris Bordacov, plaintiff in error, (hereinafter designated as defendant) to recover the sum of $135.15 for plumbing work and materials. Plaintiff's statement of claim sets out the various items of labor and materials and the reasonable value therefor. The affidavit of merits of the defendant denies he ever employed plaintiff to furnish any work, labor or materials and denies that the plaintiff ever did furnish him with any work, labor or materials, but alleges that he employed one Kaplan to build a summer kitchen for him, the defendant, including all plumbing, labor and materials necessary therefor. The defendant's affidavit of merits does not deny plaintiff's allegations as to the reasonable value of the labor and materials furnished.

It appears from the evidence that the plaintiff furnished to the house of the defendant plumbing fixtures, labor and materials for the reasonable value of $135.15, and that on December 31, 1913, the plaintiff received from the

DAVID BOULTBEE,
Defendant in Error.

Error to the
Court of Common
Pleas of Cuyahoga
County.

Plaintiff in error,

vs.

CHARLES BOULTBEE,

No. 1,

MR. JUSTICE HAUCK delivered the opinion of the court:

This is a suit which was brought in the Municipal Court of Darby Township, Delaware County, by Charles Boultbee, (hereinafter referred to as plaintiff) against David Boultbee, (hereinafter referred to as defendant) to recover the sum of $126.10 for plowing and cultivating. Plaintiff's statement of claim sets out the various items of labor and materials and the reasonable value therefor. The plaintiff at margin of the defendant denies he ever employed plaintiff to furnish any work, labor or materials nor does the plaintiff ever get further than this much, that he entered, but alleges that he employed one Dolphin to plow a certain piece for him, the defendant, inquiring if plaintiff's alleged of course done not such plaintiff's statement to the reasonable value of the labor and materials necessarily thereof. The defendant further says that the plaintiff contracted to plow for him, the defendant, for a certain consideration, which he paid, and that he has fully performed his contract in every respect.

It appears from the evidence that the plaintiff [illegible] on December 27, 1913, the plaintiff received from the defendant for the reasonable value of $122.10, as [illegible] to the terms of the defendant's claim.

defendant a check dated December 31, 1915, for the sum of $15.00.

There is no doubt but that the plaintiff did the work and furnished the materials and that they were reasonably worth the sum of $135.15. One of the contentions of the defendant is that the plaintiff was employed by xxx Kaplan, with whom the plaintiff testified he made an original contract for the whole of the work. The evidence on the subject of employment is conflicting and contradictory. There is, however, ample evidence to justify the judgment of the lower court, and under those circumstances we do not feel at liberty to set it aside. The language used by Mr. Justice Breese in Field v. C. R. I. R. R. Co., 71 Ill. 458, especially applies to the situation in this case; that language is as follows:

> "We are asked to reverse the judgment on the facts alone, and to say the court, sitting as a jury, found against the facts - gave judgment against the evidence. This court has often held, where a trial is had by the court, as to the facts, the court stands in the place of the jury, and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury. Ambs v. Honore, 24 Ill. 128; Eastman v. Brown, 32 Ib. 53. And it was emphatically said in Wood v. Price, 46 Ib. 435, that the same force and effect should be given to the finding of a judge as to the verdict of a jury."

It is further claimed by the defendant that certain so-called "job tickets" were inadmissible and should have been excluded. The plaintiff testified that at the end of each day he made memoranda on slips of paper which he carried with him for that purpose, of each day's work and the materials furnished, and that when the work was all done he copied these memoranda on his so-called "job tickets" and threw away the original memoranda; that the "job tickets"

defendant's appeal decided December 31, 1928, for the sum of $10,000.

There is no doubt but that the plaintiff did the work and furnished the materials and that they were reasonably worth the sum of $10,000. One of the contentions of the defendants is that the plaintiff was employed by xxx Layton, who was the plaintiff testified he made an original agreement to complete the entire work. The evidence on the subject of employment is conflicting and unsatisfactory. There is, however, ample evidence to justify the judgment of the lower court, and under these circumstances we do not feel at liberty to set it aside. The judgment used by Mr. Justice Browne in Wells Fargo Co. v. St. Louis S. W. Ry. Co., 43 Fed. 430, appears fully applies to the situation in this case; that judgment is as follows:

> "It was natural to assume the judgment on the surety alone, and to beg the court, relying on a jury, to find against the principal - only judgment against the defendant. This would open the door to the fraud, the surety attempt in the name of the principal to put in proof by the latter, and the defendant will be restored or relieved by the same reason which gave rise to the right to a jury. Code R. Section 4, Fed. 111; Trimble v. Wood, 19 Fed. 23. And it was accordingly held in Wood v. Price, 46 Fed. 430, that the same issue and should be given to the jury.*

It is further claimed by the defendant that certain "job tickets" were introduced and counted upon by the plaintiff as showing the amount of work done. The plaintiff testified that at the end of each day he made memoranda on slips of paper which he afterwards put in the form of "job tickets" for convenience, at each day's work and the defendant's foreman signed these slips. These slips were not introduced in evidence, but were used by the plaintiff in making up the bill of particulars.

were made in the regular course of business.

We are of the opinion that the "job tickets" were competent and admissible for either of two reasons; First, the originals were not available; Second, (as the trial judge said,) "they were his books."

C. & A. R. R. Co. V. Strawboard Co. 190 Ill. 268.

It is further contended by the defendant that the lower court erred in allowing on May 20, 1914, a remittitur of $2.00. Inasmuch, however, as the original judgment was first set aside and the remittitur then made and a judgment then entered for the amount then remaining, the proceedings were entirely unobjectionable.

Finding no substantial error in the record the judgment of the lower court is affirmed.

AFFIRMED.

made here in the original enclosed at Jonestown.

We are at the closing hour for "Jim Stevens" once
more; and especially the others of the Jonestown first.
Jim Jones said "Good bye and Love."

P. S. M. R. Jim Stevens, 190 Ltr. Jim.

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mere Jones entered for the second Jones corporate, the Jonestown
Jonestown is the Jones owner in relation.

Inquest on corporate estate is the owned the
Jones mere corporate ownership.

.ATTACH

S - 22088

A. C. JACKSON,
Defendant in Error,

vs.

BROWNING, KING & COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 197

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, at one time employed by defendant as department manager, brought suit for commissions on sales in the year 1912, and upon trial by the court had judgment for the amount he claimed, $138.79.

The facts appear to be that in 1909 defendant made a contract with plaintiff that he should be paid a commission of 2% on all sales in the boys' and children's department over $75,000 a year. Although this agreement was in writing and appears to have been produced upon the trial it is not in the record before us, so that we are not informed as to its exact terms. This agreement was renewed verbally each year thereafter and the commissions were paid to plaintiff for the years 1910 and 1911. Defendant's books of account show that the total sales in plaintiff's department for the year 1912 were $92,448.59, of which $6,939.93 were sales to customers having charge accounts.

It is the contention of defendant that plaintiff is not entitled to commissions on these charge sales for the reason, as stated, that this charge item contains charge sales which were made prior to 1912. That this is the fact

A. C. JACKSON,
Defendant in error.

vs.

MUNICIPAL COURT
OF CHICAGO.

BRENNING, ERNI & COMPANY,
a corporation,
Plaintiff in error.

MR. JUSTICE DIETZ delivered the opinion.

Plaintiff, at one time employed by defendant as department manager, brought suit for commissions on sales in the year 1912, and upon trial by the court had judgment for the amount he claimed, $750.79.

The facts appear to be that in 1909 defendant made a contract with plaintiff that he should be paid a commission of 2% on all sales in the boys' and children's department over $75,000 a year. Thereafter this agreement was in writing and appears to have been produced upon the trial; it is not in the record before us, so that we are not informed as to its exact terms. This agreement was renewed verbally each year thereafter and the commissions were paid to plaintiff for the years 1910 and 1911. Defendant's books of account show that the total sales in plaintiff's department for the year 1911 were $902,142.99, of which $4,939.32 were sales to customers having charge accounts.

It is the contention of defendant that plaintiff is not entitled to commissions on these charge sales for the reason, as stated, that this charge item contains charge sales which were made prior to 1912. That is the fact

is not wholly clear; there are many statements of witnesses to the contrary. The credit department manager of defendant testified more than once that the total above referred to represented the cash, C. O. D. and charge sales for 1912. Other witnesses corroborated this. The trial court could properly find that the evidence did not establish defendant's contention.

However, there is evidence tending to show that prior to May, 1912, defendant in its account books did not credit plaintiff with a commission on a charge sale at the time it was made, but did so at the time it was paid; that in May, 1912, the defendant changed its method of bookkeeping in this respect so that plaintiff was credited with the charge sale at the time it was made, and that the amount of $6, 939.93 charge sales, supra, included some charge sales made prior to 1912 and not yet paid. Even if this is so, it does not operate to deprive plaintiff of his commissions, for at least three reasons: (1) the defendant cannot change the contract by changing its method of bookkeeping; (2) the amount of such prior sales is indefinite, and defendant neither shows what they are nor that they had not been collected prior to suit; (3) it is evident from defendant's method of bookkeeping that by the change made in May all the charge sales, whether made prior to 1912 or not, were to be treated with reference to plaintiff's commission as cash sales. Defendant will not be permitted to bottom its defense upon a theory inconsistent with its own line of conduct.

Only two matters of defense were asserted in the affidavit of defense - (1) that plaintiff did not earn the commissions, and (2) that the commissions earned have been paid. Neither of these defenses has any tangible support in the evidence.

The judgment is affirmed. AFFIRMED.

is not wholly clear; there are many statements of witnesses to the contrary. The credit department manager of defendant testified more than once that the total sales reported to represented the sum, D. C. and charge sales for 1912. Other witnesses corroborated this. The trial court could properly find that the evidence did not establish defendant's contention.

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Only two matters of defense were asserted in the affidavit of defense - (1) that plaintiff did not earn the commissions, and (2) that the commissions earned have been paid. Neither of these defenses has any tangible support in the evidence.

13 - 22164

E. C. CONRAD,
Defendant in Error,

vs.

FRANK HESS,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

202 I.A. 199

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in an action before a justice of the peace, had judgment against defendant for rent of a farm occupied under a written lease. Defendant appealed to the Circuit Court where, after trial by the court, judgment was entered against him for $190, which he asks this court to reverse.

The lease was dated January 1, 1913, and ran for three years. By it the defendant agreed to pay $150 rental for the first year, $200 for the second year, and $225 for the third year. He entered into possession and cultivated the farm. In the fall of 1913 he had a conversation with plaintiff concerning the rent for that year, which he had not then paid, and the defendant gave plaintiff his note for $150 in payment of the first year's rent. Defendant now claims it was the understanding that this note paid the rent in full and therefore there can be no recovery of rent for that year.

Although there is controversy as to the date of the note, we are of the opinion that the greater weight of the evidence shows it was dated October 1, 1913, and was due either August 1, 1914, or October 1, 1914. The suit before the justice was commenced October 20, 1914, which

Respectfully submitted,

[illegible]

[illegible]

[illegible]

was after the note fell due. As the case before the justice was whatever the evidence made it, plaintiff was entitled to judgment of at least $150, either as rent or upon the note, and in that respect the judgment of the Circuit Court is affirmed.

$100 was paid on account of the second year's rent, leaving $100 due. We hold that the greater weight of the evidence proves that in the fall of 1914 plaintiff agreed with defendant that in consideration of the defendant yielding up immediate possession of the farm and leaving all his crops then on the ground for the use of a new tenant, the lease would be canceled and the balance of $100 due for 1914 would be considered paid in full; that thereupon defendant left his crops as they stood planted in payment of the rent, and that the new tenant who took possession used them under the directions of the landlord. We hold that defendant has established his defense as to any claim for rent after the first year, but that he is obligated for $150.

The judgment will therefore be reversed and judgment in this court entered against defendant for $150.

REVERSED AND JUDGMENT HERE.

25 - 22233

DAVID W. MANKOWITZ,
Defendant in Error,

vs.

THE KERSTEN CO., a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

202 I.A. 201

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages alleged to have been sustained by the failure of the defendant to deliver to him certain brass borings, tubings and clippings purchased by plaintiff. Upon trial by the court plaintiff had judgment for $67.75.

It is urged as ground for reversal that plaintiff has not proved his case by a preponderance of the evidence. We do not think there is merit in this contention. The court could properly believe from the evidence that plaintiff called at defendant's place of business for the purpose of buying scrap metals, and that it was agreed between him and the president of the defendant that a certain amount of brass scrap metal should be purchased at certain prices; that it was agreed that the goods should be delivered to plaintiff on the following day; that plaintiff in the meantime secured a customer to purchase this scrap, and called with his customer upon the defendant on the following day for the purpose of taking the scrap purchased by him, and was informed by the president of the defendant company that plaintiff could not have the scrap for the reason that defendant had sold it to someone else for a better price. The court was also justified in finding that the difference

DELIVERED THE MORNING OF SEP COPIES.

EX. EXPECTING TRAVIES CONSIDER

Plaintiff

Defendant in Error.

Error to Baker.

Action in Assumpsit [illegible]

IN CHICAGO.

2021A. 201

Plaintiff brought suit to recover damages alleged to have been sustained by the failure of the defendant to deliver at the agreed place, 2000lbs and 2000lbs of [illegible] Upon trial by the court plaintiff [illegible] Upon [illegible] the [illegible] Upon trial by the court plaintiff [illegible] Upon trial by the court plaintiff [illegible] Upon trial by the court plaintiff

between the price agreed upon at the time of the sale and the market price on the day on which plaintiff called for the scrap was $67.75.

Under the facts of the case plaintiff was entitled to recover, and the judgment is affirmed.

AFFIRMED.

[illegible] the motion entered during [illegible] the [illegible] and
the number [illegible] be [illegible] [illegible] entitled [illegible]
the record [illegible].

Under the facts of the case [illegible] was entitled to recover, and the judgment is affirmed.

AFFIRMED.

34 - 22276

A. J. BATES COMPANY,
Plaintiff in Error,

vs.

ISAAC JACOBS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

202 I.A. 202

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced a suit in attachment, alleging that defendant had within two years last past fraudulently conveyed or assigned his effects so as to hinder and delay his creditors, and concealed and disposed of his property, etc. The attachment writ was levied on certain goods in the store of defendant. By the affidavit of defense the indebtedness was admitted, but defendant claimed that the property levied upon was exempt from execution or levy under a writ of attachment by virtue of the statute on Exemptions, and that defendant had filed the necessary schedule claiming such exemptions.

Upon trial by the court plaintiff sought to introduce evidence tending to sustain its allegations of fraud on the part of the defendant, but the court declined to hear such evidence, holding it to be incompetent, ~~on the ground, apparently,~~ that all the court could determine was whether or not the property levied upon by the writ was included and named in the schedule of exemptions. The court evidently being of the opinion that this property was exempt, entered an order dissolving the attachment. ~~This order we are asked to reverse.~~

We are of the opinion that the trial court

V. T. Hines Company.

Plaintiff in Error,

vs.

Jesse Jackson,

Defendant in Error.

Error to Multnomah County

In Certain.

DECLARING THE RULING OF THE COURT.

Mr. Chamberlain delivered the following

OPINION.

Plaintiff commenced a suit in attachment, re-
citing that defendants had within the years last past
fraudulently conveyed or assigned his effects so as to
hinder and delay his creditors, and concealed and disposed
of the property, etc. The attachment writ was levied on
certain goods in the store of defendant. On the affidavit
of plaintiff the injunctions were modified, but defendant
claimed that the plaintiff levied upon more property
than was sufficient to satisfy his demand, and filed the
statutory undertaking therefor according to law. Upon trial by the court plaintiff sought to introduce evidence tending to sustain the allegations of fraud on the part of the defendant, but the court declined
to hear such evidence, holding it to be inadmissible under the pleadings, because all the court could determine was whether or not the undertaking filed upon the writ was sufficient. The
answer set up the defense of exemption. The
answer alleged as right disputing the attachment. There
cover attempted which of the facts stated in plaintiff's and
indebtedness was untrue in the respects of exemption. The
plaintiff in error

proceeded upon an erroneous theory. Plaintiff was entitled to introduce evidence tending to show fraud, and if the court should be of the opinion that the fraud alleged in the affidavit for attachment had been proven a judgment should have been entered sustaining the attachment.

Counsel for plaintiff has discussed the merits of the schedule filed by the defendant, but no schedule appears in the record before us, and in its absence we are unable to arrive at any opinion upon it or as to whether any of the property held by the attachment writ might properly be released.

For the reason above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

50 - 22445

ALBERT O. FRIED,
Plaintiff in Error,

vs.

OVERLAND MOTOR COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

202 I.A. 203

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the purchase price paid by him for an automobile bought, as plaintiff claims, when he was a minor. Upon trial before a jury the jury was instructed to return a verdict for the defendant, and judgment on this verdict was entered. We are of the opinion that the action of the court was proper and that the judgment should be affirmed.

The evidence shows that the automobile was purchased June 14, 1913, with money which plaintiff received from his grandmother as a gift. The automobile at this time was delivered to plaintiff. On June 1, 1914, plaintiff wrote a letter to defendant stating that he had elected to disaffirm his contract, and on or about September 12, 1914, appeared at the office of defendant and tendered the car, stating that at the time of its purchase he was a minor. He claims that he became of age on August 13, 1914. Defendant refused to accept the car, and thereupon plaintiff resumed possession of it and has kept it in his possession since then. Plaintiff testified that during the spring and summer of 1915 he used the car and drove it around the streets.

We hold that the judgment is justified upon the legal principle that where a thing is purchased during the

ALFRED O. MOORE,

Plaintiff in Error,

vs.

DEFENDANT in Error.

ERROR TO DISTRICT COURT

OF DENVER.

No. Supreme Justice Appointed

Declined the opinion of the court.

Plaintiff brought suit to recover the purchase price paid by him for an automobile bought, as plaintiff claims, more by one a agent. Upon trial before a jury the jury was instructed to render a verdict for the defendant, and judgment on this verdict was entered. To are of the opinion that the action of said court was proper and that the judgment should be affirmed.

The testimony shows that the automobile was delivered June 12, 1913, with many minor difficulties during the guarantee as a gift. The automobile at this time was delivered to plaintiff. On June 1, 1914, plaintiff wrote a letter to defendant stating that he had elected to disaffirm his contract, and on or about September 14, 1914, exchanged at the office of defendant and tendered the car. Plaintiff testified that during the period any demand that defendant be present at the time of its tender he was a minor. He claims that he became of age on August 12, 1914. Defendant on cross-examination stated that he was not aware that plaintiff was a minor at the time of the tender. Defendant testified that during the period any demand or it was not the duty of it to its partnership since plaintiff was of age.

We deem that the judgment is justified upon the ground that plaintiff failed to exercise a right in accordance with the contract. The contract provided that the car should be returned to defendant within ten days from the date of delivery. It was not returned within the time specified. Plaintiff testified that during the period any demand was made upon him to return the automobile he refused to do so and claims it to be his personal right to keep the car, and therefore plaintiff received no notice that defendant claimed a rescission. Defendant testified that he was not aware that plaintiff was a minor at the time of the tender. Plaintiff testified that during the period any demand was made upon him to return the automobile he refused to do so and claims it to be his personal right to keep the car, and therefore plaintiff received no notice that defendant claimed a rescission. Defendant testified that he was not aware that plaintiff was a minor at the time of the tender. Plaintiff testified that during the period any demand was made upon him to return the automobile he refused to do so and claims it to be his personal right to keep the car, and therefore plaintiff received no notice that defendant claimed a rescission. Defendant testified that he was not aware that plaintiff was a minor at the time of the tender.

No. 6945

ALFRED O. MOORE,

Plaintiff in Error,

vs.

DEFENDANT in Error.

ERROR TO DISTRICT COURT

OF DENVER.

No. Supreme Justice Appointed

Declined the opinion of the court.

minority and is kept and used by the minor until his arrival at legal age and then converted to his own use, such conduct amounts to an election to stand by the contract made while he was an infant. Robinson v. Hoskins, 77 Ky. 393. It has also been held that if one, after becoming of age, does any act clearly showing an intention to affirm a contract made by him during his minority he cannot afterwards repudiate it. Curry v. St. John Plow Co., 55 Ill. App. 82. We are of the opinion that the action of the plaintiff in using the car for nearly a month after he had become of age before he tendered it back to the defendant, and his continuing to retain possession of it and his use of it the following spring and summer, nearly a year after he arrived at legal age, amount to a ratification of the purchase made during his infancy.

For the reason indicated the judgment is affirmed.

AFFIRMED.

minority and is kept and used by the minor until his arrival at legal age and then conveyed to him can use, such conduct amounts to an election to stand by the contract made while he was an infant. Fehlhaber v. Fehling, 17 Ky. 393. It has also been held that if one, after becoming of age, does any act clearly showing an intention to affirm a contract made by him during his minority he cannot afterwards repudiate it. Carey v. Ft. John Fire Co., 85 Ill. App. 83. To use of the opinion that the action of the infant in using the car for nearly a month after he had become of age before he returned it back to the defendant, and his continuing to retain possession of it and his use of it the following spring and summer, nearly a year after he arrived at legal age, amount to a ratification of the purchase made during his infancy.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

53 - 22453

LAKE VIEW HOSPITAL ASS'N AND TRAINING SCHOOL FOR NURSES, a corporation,
Defendant in Error,

vs.

DR. J. M. NICHOLSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 205

MR. PRESIDING JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant for the price of room, medicine, etc., furnished to one Violet M. Dixon at the special instance and request of the defendant, for which defendant promised to pay. Upon trial plaintiff had judgment for $109, which defendant asks to have reversed on the ground that as the agreement was not in writing, signed by the defendant, it comes within the statute of frauds.

There can be no controversy that the law is that the promise to pay the debt of another after the same is incurred is void unless made upon a consideration and reduced to writing, but where goods, money or services are furnished to a third person at the request and upon the credit of the promisor the undertaking is clearly original, and in such case the statute of frauds does not apply. Lusk v. Throop, 189 Ill. 127.

The correctness of this judgment therefore depends on whether or not the facts show the promise of the defendant to be an original undertaking. We are of the opinion that the evidence shows the defendant to be primarily liable. Briefly stated, the facts are that about one o'clock in the morning the defendant brought Violet M. Dixon

TATE VIA DOUGLAS ADM'R CTD
TRANSFER DEVISE FOR PURPOSE,
& DEPOSITION,
Testimony in Cause.

-vs-

DR. J. E. EDGERTON,
Plaintiff in Cause.

Order of Dismissal
of Petition.

No. [illegible] Equity

DISMISSED FOR WANT OF PROSECUTION.

Plaintiff having not entered his defendant
for the terms of seven weeks, etc., Dismissed at cos
Appeal 2. Stone or the several Defendant and Sureties of
the Defendant, for which Defendant prosecute to pay. Upon
first Monday and Judgment for like, which Defendant
made is duly excepted to for leave time be the entered
now set to writing, signed by the Defendant, to comply
within the months of Terms.

There can be no controversy that the
time the Trustee to [illegible] the Court of Probate after the same
is inserted is void unless such a construction and
enforced in writing, but under Trust, Court to enforce
the Deeds of the Trustees the Guardianship is clearly
violation, and to such cases the statute of frauds does not
apply. Jones v. Tucker, 24 Ala. 127.

The contentions of the Defendants therefore se-
cause be overruled if not the Trusts when the Trustee of the
Defendant is be an original undertaking. In the of the
opinion that the original Cause the Defendant is be entire-
ly Insolv. Strictly speaking, the Trusts are that Equal the

to the Lake View Hospital. She had been injured by the doctor's automobile and was unconscious. The doctor was asked by an attendant at the hospital who would be responsible for the account, and replied that he would be responsible for it. The usual hospital services were rendered to Mrs. Dixon, and statements of this account were made out to the defendant and mailed to him. No statements were ever mailed to Mrs. Dixon or sent to her, nor has she ever been asked to pay the bill. There was the testimony of several witnesses that defendant had stated in the first instance that he would be responsible for the account and would pay all her expenses.

We see no reason to conclude that the trial court was not justified in deciding that this was an original undertaking of the defendant. It follows therefore that the judgment was correct, and it is affirmed.

AFFIRMED.

57 - 22472

202 I.A. 206

J. AUSTIN DUNN SPECIALTY CO., a corp., for use THOMAS P. BAIRD,
Plaintiff in Error,

vs.

ALICE L. DUNN, Admx. Estate of J. Austin Dunn, Deceased,
Defendant in Error.

Error to
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a claim for $8,017.35 against the defendant in the Probate Court, and after hearing the claim was not allowed. Plaintiff thereupon appealed to the Circuit Court, and there after trial by the court it was adjudged that the claimant should take nothing. We are asked to reverse this judgment.

The controversy has to do with matters of book-keeping. From the evidence the trial court properly find that J. Austin Dunn was a practicing dentist in Chicago, and from 1902 until his death in 1913 was also president and treasurer and principal stockholder in the J. Austin Dunn Specialty Company, the plaintiff. This company manufactured and dealt in dental cement and other dental supplies from the time of its organization until about 1912, while the goods were being introduced and the business being built up, the disbursements largely exceeded the receipts. Dr. Dunn furnished the cash necessary to meet the deficiency and so developed the business; from his personal funds he carried the finances of the company, using its receipts as far as

2021.A.206

1. ADDITIN DRUG COMPANY ET..
e resp., 152 use TRUSTEE P.
BEARD.
Plaintiff in Error,
Error to
Circuit Court,
va.
Cook County.
ELIOT L. CHAY, Adm. Estate of
2. Austin Dunn, Deceased,
Defendant in Error.

MR. JUSTICE JUSTICE DOUGLAS
DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a claim for $6,617.50 against the estate in the Probate Court, and after hearing the claim was allowed. Plaintiff Carrigan appealed to the Circuit Court, and there after trial by the court it was adjudged that the claimant should take nothing. He has asked to reverse this judgment.

The controversy has to do with matters of bookkeeping. From the evidence the trial court properly find that J. Austin Dunn was a practicing dentist in Chicago, and from 1906 until his death in 1913 was also president and treasurer and principal stockholder in the J. Austin Dunn Specialty Company, the plaintiff. This company manufactured and dealt in dental cement and other dental supplies from the time of its organization until about 1911, while the goods were being introduced and the business doing built up, the disbursements largely exceeded the receipts. Mr. Dunn furnished the funds necessary to meet the deficiency and no developed the business; from his personal funds he carried the expenses of the company, using the receipts as far as

they would go, and furnishing additional cash of his own as needed to pay all bills. Until May, 1910, he worked without a salary, but at this time he was voted by the directors a salary of $100 a month, but never drew any of it. After February, 1910, Dr. Dunn carried the bank account in the name of the company but continued to finance it as he had previously done, putting his own earnings from his profession into the same bank account, and drawing against this both for his own personal use and for the use of the company. When more money was needed than his personal earnings and the receipts of the company afforded he borrowed what was needed on his personal notes and put the proceeds of such notes into the bank account. The interest on these loans was paid by check on the bank account and entered on the company's books as part of the expense of the company, but the principal of these loans did not appear on the company's books except as a part of the cash credited to Dr. Dunn. A few payments on account of principal appear on the company's books and were charged back to Dr. Dunn. Full and complete books of account were kept for the company, consisting of the usual cash books, journal, ledger and minute book. The cash books show from day to day the receipts of the company and collections and disbursements; they also show disbursements largely in excess of the receipts; and when the books were audited, which was done at intervals by an accountant and bookkeeper, this excess of disbursements over receipts was credited to the personal account of Dunn. The doctor was also given credit for his unpaid salary from May 1, 1910, to May 1, 1913.

Thomas P. Baird, for whose use this suit is brought was an employe in charge of the factory, also stock-

holder, director after May, 1911, and vice president after May, 1912; after Dr. Dunn's death in 1913 Mr. Baird was elected president. Subsequently Mr. Baird as president of the company, and Mr. Chamberlain, its secretary, who was also an accountant and bookkeeper, audited the books and made up a statement showing the condition of the account between the company and Dr. Dunn; they found a balance due from the company to him of $5,601.54, and closed the account of Dr. Dunn on that basis. This balance due from the company and the 739 shares of stock belonging to Dr. Dunn were inventoried as assets of his estate and were ordered sold together by the Probate Court, and were so sold in February, 1914, and the company settled with the purchaser of this claim. Subsequent to this the claim on which this suit is based was filed in the Probate Court. On its face this claim represents all money checked out of the bank account for the personal use of Dr. Dunn, without allowing him any credit for money deposited in the bank account or advanced by him.

The record indicates that the trial judge found the books were accurately and properly kept, showing all receipts and expenditures of the corporation, and with this conclusion we are in accord.

The plaintiff bases its claim upon the legal proposition that where an agent intermingles funds of his own with those of his principal, if he is unable to show clearly what part of the propety belongs to him all of it will be treated as the property of his principal. Illinois Linen Co. v. Hough, 91 Ill. 63. This, however, is based upon a rule of evidence, namely, that in such a case the presumption will be against the agent. Like many presumptions, however, it may be removed by evidence, and if the accounts have been so

kept that the property of the agent and of the principal can be clearly distinguished courts will allow to each what is justly theirs. We see no reason to disagree with the conclusion of the trial court in the instant case that the accounts were properly kept so that the amounts due to Dr. Dunn and the corporation, respectively, can be accurately and properly determined, and we agree with the conclusion that the accounts showed nothing due from Dunn or his estate to the company.

Another consideration which is a complete bar to plaintiff's claim is that there was an account stated between the parties. As indicated above, after the death of Dr. Dunn the books were audited and the accounts agreed upon, which showed an indebtedness from the corporation to the doctor. This indebtedness was afterwards settled by the company, thus closing any obligations shown by the books between them. The settlement seems to have been fairly and deliberately made and will not be lightly set aside, and no sufficient grounds have been shown for setting it aside.

While there may be some doubt as to the admissibility of some of the evidence offered, yet such error, if any, is not sufficient to justify a reversal, where the same result would follow without the evidence objected to. See White Mem. House v. Mueg, 204 Ill. 422.

Holding, as we do, that the judgment of the Circuit Court was right, it will be affirmed.

AFFIRMED.

kept that the property of the agent and of the principal
can be clearly distinguished there will often be enough
doubt to justify choice. We see no reason to disagree with
the conclusion of the trial court in the instant case that
the accounts were properly kept so that the amounts due
to Dr. Dunn and the co-partners, respectively, can be
ascertained and properly determined. We do agree with the
conclusion that the accounts showed nothing due from Dunn
or his estate to the company.

Another consideration which is a complete bar to
plaintiff's claim is that there was an account stated be-
tween the parties. As indicated above, after the death of
Dr. Dunn the books were audited and the accounts figured
upon, which showed an indebtedness from the corporation to
the doctor. This indebtedness was afterwards settled by
the company, thus relieving any obligations owing by the doctor
between them. The settlement seems to have been fairly and
deliberately made and will not be disturbed set aside, and no
material grounds have been shown for setting it aside.

While there may be some doubt as to the ultimate-
ility of some of the evidence objected to, yet such error, if
any, is not sufficient to justify a reversal, where the same
result would follow with or the evidence objected to. See
Spire Inv. Bureau v. Dent, 208 Ill. 488.

Judgment is as de, that the judgment of the Circuit
Court was right, it will be affirmed.

AFFIRMED.

73 - 22490

PEOPLE ex rel.
NELLIE MARKOWSKI,
Defendant in Error,

vs.

JOSEPH WOJCZEKOWSKI,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

202 I.A. 208

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

The defendant was found by a jury to be the father of the bastard child of Nellie Markowski, and judgment was entered on the verdict. We see no reason to disturb this. The complaining witness told a clear and positive story, which was not overcome by the denial of the defendant. There is nothing improbable in her narrative, and the jury which saw the witnesses was better qualified to judge of their credibility than are we.

Many points are made by counsel for the defendant as grounds for a reversal, but none of them has merit. As to the claim that there was lack of proof that the child was born alive, it appears from the record that the child was present in open court where the jury could see it.

Other points suggested are sufficiently met by the fact that there is no certificate in the bill of exceptions or statement of facts that there is contained therein all of the evidence heard. So far as appears from this document other evidence may have been presented to the jury.

There is no substantial reason presented to us for reversing the judgment, and it is affirmed.

AFFIRMED.

2021.208

The defendant was found by a jury to be the father of the bastard child of Julia Hargrave, and judgment was entered on the verdict. To pay the penalty he alleges error. The contradictory evidence did a clear case for the plaintiff. Which was not overcome by the mutual promise. There is nothing improbable in the narrative, nor the jury right when the witnesses are partisans to justify a basic credibility such are so. Some points are made by counsel for the defendant as grounds for reversal, but none of them are material. As to the claim that there was lack of privity between the plaintiff and the defendant, it appears from the record that the child was given its mother's name at its birth at the home of the maternal grandparents. In fact we believe that privity was shown sufficiently for the jury to find as they did.

Other points mentioned are sufficiently met by the fact that there is no exception to the bill of exceptions or statement of facts upon which it purports to be based. We find no reversible error in the record.

There is no substantial reason presented to us for reversing the judgment, and it is affirmed.

79 - 22497

ROBERT R. ENGELS and GEORGE J. HENCE, trading as ENGELS & HENCE,
Defendants in Error,

vs.

AGNES MANNING,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 209

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a suit by plaintiffs to recover real estate brokerage commissions, upon trial by the court judgment was entered against the defendant for $140. The only question involved is whether plaintiffs were the procuring cause in bringing about the transfer of the property in question. If they were the judgment is correct.

The evidence shows that in March, 1915, the defendant had listed this property with plaintiffs for sale. Plaintiffs advertised the property in the Chicago papers over their firm name and address. In the fall of that year a Mr. Trevett, seeking a place to rent, called at the office of D. J. Burke, a real estate broker, and was told that plaintiffs were renting agents for defendant's property and had the keys. Trevett went to the office of plaintiffs to get the keys and asked about a place to rent. He was given information by Mr. Engels, one of the plaintiffs, about a vacant flat and also about the condition of defendant's property, and Engels suggested that he buy the property and gave him a price for the same. Trevett said he would be over with his wife and daughter the next day. Engels thereupon called up the defendant and told her that the

[illegible]

[illegible]

[illegible]

property had been submitted to Mr. Trevett. Trevett returned to the office of Burke, who called the defendant over the phone, and she met Trevett in Burke's office that afternoon and a contract was signed. Plaintiffs informed defendant that Mr. Trevett was their customer and that she would have to pay a commission.

We are persuaded from these facts that the plaintiffs were the procuring cause of the sale. The fact that the deal was closed elsewhere than in their office cannot deprive them of their commissions. The judgment is right and is affirmed.

AFFIRMED.

ARTICLE.

right and is affirmed.

Justice Dunlop's time of their conclusion. The judgment is
reason Justice that the trial was closed Thursday then in their office
jurisdiction were put Procuring owners of the suit. The

It the Procurement find three facts that the
that Plaintiff Defendants that by. Leavell. Counsel re-
that Plaintiff and a contract was signed. Incredible in-
tained Plaintiff over the Dunbar's office.
tioned to the office of Jacks, was waived the Defendant
Accepted that been Authorized on by. Leavell. Counsel re-

1 - 21451

EMILIO LONGHI, trading as Italian & Greek Products Co.,
Plaintiff in Error,
vs.
FREDERICK SABATINI,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 213

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In his statement of claim filed in the Municipal Court the plaintiff in this case alleged that the defendant while acting as his agent collected $70.91 which he has failed to turn over to plaintiff. Defendant in his affidavit of merits claimed a set-off against plaintiff for the sum of $93.87.

When the case was called for trial on February 4, 1915, a Mr. Whittle, law clerk for plaintiff's counsel, informed the court that plaintiff's counsel was actively engaged in the trial of a case in another court, and moved the court to continue the trial of the cause until a future day. The motion was denied, and the plaintiff being present in court the case proceeded to trial. Judgment was entered in favor of defendant on his claim of set-off for the sum of $93.15. Subsequently a motion was made to vacate this judgment, which motion was supported by affidavit. The motion to vacate was denied, and plaintiff brings the case here by writ of error for review.

The sole complaint of plaintiff is that the trial court erred in not allowing the motion for the postponement of the hearing. The rules of the Municipal Court relied upon by plaintiff do not appear in the abstract of record or

Defendant in Error.

vs.

PLAINTIFF IN ERROR,

Plaintiff in Error,

vs.

Defendant in Error.

ERROR TO MUNICIPAL COURT

OF CHICAGO.

2021.219

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

In his statement of claim filed in the municipal court the plaintiff in this case alleged that the defendant while acting as his agent collected $70.00 which he thereafter failed to turn over to plaintiff. Defendant in his affidavit of merits claimed a set-off against plaintiff for the sum of $63.97.

When the case was called for trial on February 4, 1919, a ex. control, the plaintiff's counsel, informed the court that plaintiff's counsel was actively engaged in the trial of a case in another court, and moved the court to continue the trial of the cause until a future day. The motion was denied, and the plaintiff being present in court the case proceeded to trial. Judgment was entered in favor of defendant on the claim of set-off for the sum of $30.00. Subsequently a motion was made to vacate this judgment, which motion was supported by affidavits. The motion to vacate was denied, and plaintiff brings the case here by writ of error for review.

The sole complaint of plaintiff is that the trial court erred in not allowing the motion for the postponement of the hearing. The rules of the municipal court relied upon by plaintiff do not attempt to deprive of control by the

the record filed in this court. It is held in Sixby v. Chicago City Ry. Co., 260 Ill. 478, that this court cannot take judicial notice of the rules of the Municipal Court of Chicago.

No affidavit was presented to the court at the time the motion for the postponement of the trial was made; hence we have no means of determining on this record whether the action of the trial court in not allowing the motion for a postponement was or was not an abuse of judicial discretion. The presumption is that the court acted legally and fairly.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

the second Clay to this court. It is held in Davis v. Chesapeake Ohio Ry. Co., 101 Ky. 410, that this court cannot take judicial notice of the rules of the Kentucky Court of Appeals.

It plainly was necessary in the court of the trial to allege the motion of the trial court in not allowing the motion for a peremptory was or was not an abuse of judicial discretion. The exceptions to such the court would consider a peremptory was or was not an abuse of judicial discretion of the trial court in not allowing the motion unless the motion for the peremptory of the trial was made; and plainly.

The judgment of the municipal court is affirmed.

Appellant.

11 - 22150

JULIAN U. MALMIN,
Defendant in Error,

vs.

JULIUS STERNHEIM,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 214

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Dever, J. This case comes to this court on a writ of error to review the judgment of the Municipal Court of Chicago. Plaintiff alleged in his statement of claim that he was injured while bathing at Wilson Beach, in the city of Chicago, by being run down by a motor boat operated by the defendant.

The testimony of plaintiff and his witnesses tends to prove that between 3 and 4 o'clock on the afternoon of Saturday, July 17, 1915, the plaintiff, in company with two friends, was bathing in Lake Michigan at Wilson Beach in Chicago; that at the time of the accident he was about 100 feet east of the shore line; that a large number of people were bathing at the beach at the time; that just before being struck plaintiff had dived, and as he came to the surface of the water a motor boat driven by the defendant struck him.

Defendant testified that he was driving the motor boat along the beach in a northerly direction; that when he reached the beach he saw 4 or 5 people in the water about 100 feet ahead of him and 8 feet west of the line upon which his boat was moving; that he blew his signal horn and went "right along on my right of way."

[illegible] in favor.
[illegible] against.
[illegible] in favor.
[illegible] against.
[illegible] in favor.
[illegible] against.
[illegible] in favor.
[illegible] against.

[illegible] BY UNANIMOUS [illegible]
[illegible] BY CHICAGO.

[illegible]

[illegible]

[illegible]

The evidence shows that there was a diving stand built out in the water at a point from 25 to 50 feet south of the place where plaintiff was struck. In testifying the defendant said that in his course north he ran about 100 feet east of this stand, and that he was going to the beach to go in bathing. Other witnesses testified that there were about 2,000 people bathing in the water in the immediate vicinity of the place where this accident happened.

The case was tried in the Municipal Court without a jury, and judgment was entered in favor of the plaintiff for the sum of $300. It is our opinion that under the circumstances disclosed by this record the question of the negligence of the defendant, as well as that of contributory negligence on the part of the plaintiff, were purely questions of fact, and we do not think that the finding and judgment of the trial court are unsupported by the evidence. Even if it be said that the defendant had a legal right to operate his boat at a crowded bathing beach, he must be held to the care which an ordinarily prudent person would have exercised in circumstances similar to those in which defendant had placed himself at and just prior to the time of the accident.

There being evidence in the record tending to support the finding of the Municipal Court, the judgment of that court will be affirmed.

AFFIRMED.

15 - 22199

EMILY GOLDSCHMIED,
Defendant in Error,

vs.

NATIONAL COUNCIL, KNIGHTS AND LADIES OF SECURITY,
Plaintiff in Error,

} ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 216

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court. In that court plaintiff brought suit against the defendant and had judgment for $1,000.

The defendant was a fraternal benefit society, having its principal place of business at St. Louis, Missouri. On February 27, 1906, it issued, through Future Great Council No. 1367, a subordinate lodge, a benefit certificate to Arthur Goldschmied, and the plaintiff, his wife, was named therein as the beneficiary. Goldschmied died on March 16, 1914. The defense to the action brought by his widow on the benefit certificate was that Goldschmied at the time he became a member of the defendant society was engaged in business as a saloon keeper, and that saloon keepers, as a class, were prohibited from membership in this society; that in his application for membership Goldschmied had falsely stated that he was by occupation a restaurant keeper, and that he had warranted this statement to be true.

It was provided in the benefit certificate admitted in evidence that if the representations made in the application for the certificate were not true in every respect then the certificate should be considered null and void, and that if the applicant was at the time he signed

[illegible]

[illegible]

vs.

[illegible]

[illegible]

[illegible]

such application or thereafter became engaged in a prohibited employment such certificate also was to be held void. The by-laws of the defendant are to the same effect. Section 120-a of defendant's by-laws in force at the time of Goldschmied's death is as follows:

> "National Council Not Bound by Knowledge of or Notice to Officers or Members of Local Councils. - No Officer of this society nor any local council officer, nor member thereof, is authorized or permitted to waive any provisions of the by-laws of this society, which relate to the contract between the member and the society, whether the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by or notice to any subordinate council or officer or member thereof, or by or to any person be held or construed to be the knowledge or notice to the National Council or the officers thereof, until after said information or notice be given in writing to the national secretary of the order."

Section 169 of the by-laws is in part as follows:

> "The National Council shall not be liable for any negligence in any of these matters, nor be bound by any irregularity, neglect or illegal action by a subordinate council or by any of its officers."

The by-laws introduced in evidence on the trial indicate that, from the time Goldschmied became a member of this organization up to the time of his death, there was a provision in the by-laws that prohibited saloon keepers from membership in the order.

From the evidence taken it satisfactorily appears that the deceased, Goldschmied, did in fact conduct a saloon in St. Louis at the time he became a member of the defendant society. At that time deceased and plaintiff, his wife, lived in two rooms just above the saloon, and meals were sometimes served in one of these rooms to patrons of the saloon. Plaintiff testified that she was present when Dr. Becker, the local examiner of the defendant, examined her husband for membership; that there were also present a Mrs. Grenzebach, financier of Future Great Council No. 1367,

such application or thereafter persons engaged in a particular employment such certificate also was to be held void. The by-laws of the defendant are to the same effect. Section 110-a of defendant's by-laws in force at the time of Goldsmith's death is as follows:

> "Persons covered not found by knowledge of or failure to utilize or hearsay of local councils. - No officer of this society nor any local council officer, nor member thereof, is authorized or permitted to waive any provisions of the by-laws of this society, which relate to the contract between the member and the society, whether the same be one in force or lapsed or reinstated. Failure until any knowledge or information obtained by or notice to any subordinate council or all or failure of member thereof, or by or to any person be paid or construed to be the knowledge or notice to the National Council or the officers thereof, until after said information or notice be given in writing to the national secretary of the order."

Section 149 of the by-laws is in part as follows:

> "The National Council shall not be liable for any misfeasance in any of these matters, nor be bound by any irregularity, neglect or illegal action by a subordinate council or by any of its officers."

The by-laws introduced in evidence on the trial contain [illegible] that, from the time of his death, there was a [illegible] ation by to the time of his death, there was a [illegible] ation in the by-laws that prohibited action herefore from comparably in the prior.

[illegible] the evidence shows it definitely un- [illegible] to it. Lewis at the time he became a member of the [illegible] society. At that time [illegible] and plaintiff, the [illegible] ville, lived in the house that owned the saloon, and Lewis [illegible] there sometimes worked in one of these rooms to [illegible] the saloon. Plaintiff testified that she was present when Dr. Heiser, the local examiner of the defendant, examined her husband for insurance; that there were [illegible]

Mr. Grenzebach, who was acting as assistant deputy to Mr. Biby, the district manager for defendant society at St. Louis, and two other men; that the examination of deceased was had in the saloon; that Dr. Becker asked questions of the deceased and that the doctor and Mrs. Grenzebach wrote down deceased's answers; that the deceased at the time could speak only a few words of English, and that Dr. Becker talked to him in German; that she, plaintiff, could remember all the conversation had during the examination; that the doctor did not ask her husband "what was his business"; that before her husband signed the application the doctor read it over to her and her husband in the presence of all who were there, and that after that her husband signed it; that the doctor did not read that her husband's occupation was that of restaurant keeper; that every one present talked in German; that the doctor read the application in English and explained it in German.

The real question in controversy here is, whether the fact of deceased's saloon employment at the time he became a member of the society, and thereafter until his death, was brought home to the defendant society at such time and in such manner as that the jury were warranted in finding, as it did in fact, that the defendant must be considered to have waived the right under its by-laws and the provisions of the application for membership, to nullify the benefit certificate issued by it to deceased.

In Order of Foresters v. Schweitzer, 171 Ill. 325, where the member was a bartender, and was not entitled to the rate he was paying, the court in its opinion said:

> "In associations of this character the relation of the members to the order is necessarily through the subordinate lodges, and when a forfeiture of the certificate of insurance is insisted upon, it is proper

Mr. Greenbaum, who was acting as assistant deputy to Mr. Bibby, the district manager for Gatewhouse society at St. Louis, and two other men; that the examination of deceased was had in the saloon; that Dr. Decker called questions of the deceased and then the doctor and Mrs. Greenbaum wrote down deceased's answers; that the examination at the time could occupy only a few words of English, and that Dr. Decker talked to him in German; that she, plaintiff, could remember all the conversation had during the examination; that the doctor did not ask her husband "what was his business"; that before her husband signed the application the doctor read it over to her and her husband in the presence of all who were there, and that after that her husband signed it; that the doctor did not read that her husband's examination was that of preliminary keeper; that every one present called in German; that the doctor read the application in English and explained it in German.

The real question in controversy here is, whether the fact of deceased's saloon employment at the time he became a member of the society, and thereafter until his death, was treated lines by the defendant society at such time and in such manner as that the jury were warranted in finding, as it did in fact, that the defendant must be considered to have waived the right under its by-laws and the provisions of the application for membership, to notify the benefit certificate issued by it to deceased.

In Order of Protection v. Cunningham, 171 Ill. 329, where the member was a barkeeper, and was not mentioned in the rule by name, the court in its opinion said:

"In accordance of this character the rule-

to show that the subordinate lodge, with full knowledge of the alleged cause of forfeiture, continued to treat the insurance as in full force, receiving the member's dues and paying the money over to the supreme lodge. We are unable to see how such societies could be conducted upon any other principle, without great injustice to the members."

That the local lodge of a fraternal benefit society is the agent of the supreme lodge and may waive its by-laws has been decided by well considered cases in this state. It was held in Zeman v. North American Union, 263 Ill. 304, that a benefit society waives the right to forfeit a member's benefit certificate on the ground that he was engaged in a prohibited occupation, where the president, the local organizer and collector and the secretary of the local order made numerous visits to the member's place of business and knew the character of his occupation. It was contended in Coverdale v. Royal Arcanum, 193 Ill. 91, as it is here, that the defendant could not be held bound by the action of a subordinate lodge, and that therefore what the latter may have known or done was wholly immaterial. In deciding the case the court said: "During all this time the insurance certificate was treated as being in full force, and Wasserman was received and treated as a member, notwithstanding the knowledge on the part of the officers and members of the subordinate lodge of the falsity of the statement contained in his application. Certainly, under the doctrine of Order of Foresters v. Schweitzer, supra, there was a waiver of the forfeiture of the certificate of insurance."

The evidence in this case clearly tended to prove that the officers of the local lodges knew of the prohibited nature of the business deceased was engaged in, from the moment that the defendant society accepted him as a member. The different local lodges of which deceased was a

to know that the unscrupulous lodge, with full knowledge of its alleged cause of forfeiture, continued to issue the instrument as in full force, receiving the member's dues and paying the money over to its supreme lodge. To ask members to see one such situation could do unspeakable harm not only to individuals, although great injustice to the member.'

That the local lodge of a fraternal benefit society is the agent of the supreme lodge was not only held by-laws has been decided by well considered cases in this state. It was held in Jones v. Delta Beneficial Union, 183 Ill. 304, that a benefit society might have the right to forfeit a member's benefit participated in the ground that he was engaged in a prohibited occupation. Where the fraternity, the local subordinate and collector and the secretary of the local order were mere agents to the society's plans of business and bore the character of its association. It was contended in Cartwright v. Royal Arcanum, 193 Ill. 87, as it is here, that the agreement should not be held bound by the action of a subordinate lodge, and that further that the latter may have known at times was unable to measure. In leading the case the court said: 'During all this time the insurance certificate was treated as binding in full force, and assessments were promptly and treated as a member, notwithstanding the knowledge on the part of the officers and members of the subordinate lodge of the falsity of the statement contained in its application. Certainly, under the doctrine of Cartwright v. Supreme, there was a waiver of the forfeiture of the conditions of insurance.'

The evidence in this case clearly tended to prove that the officers of the local lodge knew of the beneficiary's acts of the insurance clearing was wrongful in. From the moment that the defendant company was an agent. The different local lodges of which he was a

member for nine years received the dues and assessments paid by him, and on several occasions, ~~as shown by the record,~~ the officers went to his saloon and made collections from the deceased and also from the plaintiff, who became a member of the society at the same time as her husband. The doctor who examined deceased at the time of the application was signed/also the president of the local lodge. On that occasion he drank two glasses of beer that were served to him by deceased, and he testified that at the time he examined deceased he supposed that deceased had some authority in the saloon, whether as bartender or otherwise. On one occasion, at a meeting of a local lodge of defendant in Chicago, deceased informed the members, certain officers being present, that he had bought a saloon at 158 North Green street, and he invited everybody present to call on him. It further appears ~~from the evidence~~ that J. N. Bair, district manager for the defendant in Chicago, was notified about a month before the death of Goldschmied that he was a saloon keeper, and that he, Bair, had made some inquiry at the City Hall to determine whether Goldschmied had been granted a license. The evidence does not disclose that any inquiry or complaint was made to deceased or the plaintiff as to the nature of deceased's employment. There is but little doubt that several of the officers of the local lodges knew of deceased's occupation, and there is evidence tending to show that this knowledge was in fact brought to the attention of the officers of the National Council of defendant. So far as the record shows the deceased had always been treated as a rightful member of the society; no attempt was ever made to forfeit the benefit certificate during his life time, and no offer was made at any time to return to

him the dues and assessments which he had paid to defendant during the nine years of his membership.

Under the later decisions in this state the local lodges of an organization such as the defendant are held to be the agents of the supreme lodge, and the knowledge which comes to these agents within the scope of their employment ought, in justice, to be chargeable to the principal.

From an examination of the whole record we are unable to discover any evidence from which it may fairly be inferred that Goldschmied was received as a member of Future Great Council through collusion with its officers, as contended here by defendant. Plaintiff testified that Dr. Becker, who examined deceased and who filled in the blanks in the application, made no mention or inquiry as to the deceased's business. This is denied by Dr. Becker; but whatever may be the truth as to what was said or done at the time deceased signed the application for the certificate, there is no evidence in this record from which fraud or collusion as between Dr. Becker and other officers of the local lodge and Goldschmied can reasonably be inferred. "Where one makes true answers to the questions in an application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company, even though the application contains a stipulation that the agent took the application as the agent of the insured." Royal Neighbors of America v. Boman, 177 Ill. 27; see, also, Provident Life Society v. Cannon, 201 Ill. 260. Dr. Becker, the president and medical examiner of Future Great Council, at the time he examined the deceased for membership was acting as the

agent of defendant, and his failure to inquire as to defendant's business does not, in and of itself, indicate any fraud on the part of Goldschmied. In the absence of evidence of fraud or collusion Goldschmied was in no sense responsible for the action of Dr. Becker.

This court is not willing to go to great lengths to find a reason to reverse a judgment, under the circumstances shown to exist in this case. The evidence fairly tends to show that the deceased made no effort to conceal his occupation. The officers of the different lodges of which he was a member visited his saloon several times and had gone there to collect the dues and assessments for their society. The defendant has retained to itself the money paid by deceased during his membership of nine years. Organizations such as defendant serve a useful purpose and are entitled to the protection which the law, their by-laws and rules are intended to give them, but they ought not to be relieved from the exercise of the care and alertness which is required of all persons who transact business through the aid of agents.

We are of the opinion that there was introduced on the trial sufficient evidence to support the verdict of the jury.

Complaint is made of the rulings of the trial court in sustaining objections to testimony offered by the defendant. We do not think the court erred in this particular.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

28 - 22247

JOSEPH MARKS,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY,
Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 220

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Joseph Marks, brought suit in the Municipal Court against the defendants, Chicago City Railway Company and Chicago Railways Company. At the close of plaintiff's case the court instructed the jury to return a verdict for the defendants. The jury did so, and the plaintiff here seeks a reversal of the judgment entered on this verdict.

Plaintiff was injured about 2 o'clock in the afternoon of December 30, 1912, by being struck by a street car of the defendant Chicago City Railway Company as it was passing south on Western avenue at a point about 20 feet north of the north line of Wabansia avenue, in Chicago. Plaintiff in his own behalf testified that at the time of the accident and for five years prior thereto he had been in the employ of the Brand Brewing Company; that at the time he was struck by the car he was working for his employer, loading saloon fixtures, which had been taken from a saloon located at the northwest corner of Wabansia and Western avenues, onto a platform wagon which stood lengthwise of Western avenue and about 18 inches east of the west curb line, facing north; that this wagon stood about 20 feet north of Wabansia avenue; that its platform was 18 feet long by 7 feet wide.

JOSEPH MARKS,

Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY,

Defendants in Error.

} ORDER OF CHICAGO.

} ORDER TO ABSTRACT.

2052 I.A. 2520

ER. Motion taken MEDIATED and ordered on the docket.

Plaintiff, Joseph Marks, brought suit in the municipal Court against the defendants, Chicago City Railway Company and Chicago Railways Company. At the close of plaintiff's case the court instructed the jury to return a verdict for the defendants. The jury did so, and the plaintiff here seeks a reversal of the judgment entered on this verdict.

Plaintiff was injured about 3 o'clock in the afternoon of December 30, 1913, by being struck by a street car of the defendant Chicago City Railway Company as it was passing south on Western avenue at a point about 20 feet north of the north line of Pensonia avenue, in Chicago. Plaintiff in his own behalf testified that at the time of the accident and for five years prior thereto he had been in the employ of the Grand Trunk Company; that at the time he was struck by the car he was waiting for a conveyance, loading boxes, which had been taken out of Western avenue, onto a platform wagon which stood in front of Western avenue and about 12 inches east of the west curb line, facing north; that this wagon stood perpendicular to Western avenue and was 10 feet long by 7 feet wide.

The evidence tends to show that the distance between the west rail of the southbound or west tracks on Western avenue and the west curb line of the street was 11 feet 4 inches, and that the outer or west edge of the front step of the car which struck plaintiff extended about 2 feet west of the west rail; that at and immediately before the time of the accident the plaintiff and a co-employe, named Steinhelber, were standing on the east side of the wagon and were engaged in tying on the load of saloon fixtures. Plaintiff testified that he was pulling down on the rope so that Steinhelber could make a knot in it; that then he, the plaintiff, tried to get out of the way of the car "but the car hit me and I fell down by the wagon"; that at the time he was struck he was facing south and Steinhelber was facing north.

Steinhelber testified that he saw the car coming from the north when it was about 25 feet away; that he held onto the rope and dodged down under the wagon to let the car go by; that when he first saw the car he said to plaintiff, "look out for the car - the car is coming"; that plaintiff went south of him to get out of the way; that the car was going "pretty fast"; that he did not hear any bell rung on the car, and that the thing that attracted his attention to the car was the noise of the car itself.

The evidence in the record tends to prove that plaintiff was struck by the front step of the car, and that after the accident the car stopped with its rear end at a point 50 to 75 feet south of the south curb line of Wabansia avenue. The day was clear, and both plaintiff and Steinhelber testified that there were no other cars in the immediate vicinity and that they could see for a distance of 2

The evidence tends to show that the distance between the west rail of the eastbound or west trackway Western Avenue and the west curb line of the street was 11 feet 4 inches, and that the outer or west edge of the front step of the car which struck plaintiff extended about 1 foot west of the west rail; that at and immediately before the time of the accident the plaintiff and a co-employe, named Steinhelper, were standing on the east side of the wagon and were engaged in tying on the load of saloon fixtures. Plaintiff testified that he was pulling down on the rope so that Steinhelper could make a knot in it; that the car, the plaintiff, tried to get out of the way of the car "but the car hit me and I fell down by the wagon"; that at the time he was struck he was facing south and Steinhelper was facing north.

Steinhelper testified that he saw the car coming from the north when it was about 25 feet away; that he paid onto the rope and dodged down under the wagon to let the car go by; that when he first saw the car he said to plaintiff, "look out for the car - the car is coming"; that plaintiff went south of him to get out of the way; that the car made "pretty fast"; that he did not; does not well recall on the car, and that the sliding that attracted his attention to the car was the noise of the car itself.

The evidence in the record tends to prove that plaintiff was struck by the front step of the car, and that before the accident the car stopping with its rear end at a point 80 to 90 feet south of the south line of Wellington Avenue. The day was clear, and both plaintiff and Steinhelper testified that there were no other cars in the immediate vicinity and that they could see for a distance of 2

or 3 blocks. As a result of the accident plaintiff's arm was broken and he received other wounds about his head and body.

Counsel for plaintiff complain of the action of the court in giving at the close of plaintiff's case the instruction to the jury to find the defendants not guilty. We are inclined to agree with plaintiff's counsel that the evidence admitted in the case should have been submitted to the jury. Plaintiff at the time he was injured was engaged in a lawful occupation, and he had a legal right to use the public highway in doing the work he was engaged in. It cannot, under the authorities in this state, be held that by placing himself in the street to perform the work of his employer under the circumstances shown here, he had committed an act that was negligent as a matter of law. The evidence tends to prove that he was engaged in pulling down on a rope so that Steinhelber, his co-employe, could make a knot in it. Plaintiff's back was turned toward the north, and he does not appear to have had any notice of the approach of the car until warned by Steinhelber.

In Stack v. East St. Louis Ry. Co., 245 Ill. 308, the Supreme Court said:

> "It was possible for him, by the exercise of a sufficiently high degree of care, to have discovered the eastbound car and not to have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight, and to expect the appellant, in running its car past another car stopped for the discharge of passengers, to give warning and to observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury."

[illegible]

[illegible]

[illegible]

The plaintiff admits that he did not look to see whether a car was approaching the place where he was employed, but while the evidence of this fact was properly admissible on the question of his negligence or lack of negligence, it cannot be said that it was an act of negligence per se.

> "Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se." C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 148.

Whether the work that plaintiff was engaged in at the moment he was struck had so distracted his attention from the things occurring about him as to relieve him from the charge of negligence in his not knowing of the approach of the street car was a matter of fact which should have been submitted to the consideration of the jury.

The defendants insist that the evidence admitted at the trial relating to the question of the defendants' negligence or lack of negligence was of such character that the minds of all reasonable men would conclude that the defendants were in fact guilty of no act of negligence which proximately contributed to the accident and the injury which was sustained by plaintiff. We are inclined to the view that the evidence relative to this question also presents a matter that under the law should have been determined by the jury. As stated, the evidence tends to show that the car in question was moving fast at the time plaintiff was struck, that the day was clear, and that therewere no othercars or

The plaintiff admits that he did not look to see whether a car was approaching the place where he was employed, but avers the evidence of this fact was properly admissible on the question of his negligence or lack of negligence, it cannot be said that it was an act of negligence per se.

"Unconsciously a failure to look or listen, especially where it affirmatively appears that looking or listening might have merely exposed the injured to injury to save life and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various qualifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se." R. & L. R. Ry. Co. v. Delaney, 149 Ill. 141, 148.

Whether the work that plaintiff was engaged in at the moment he was struck had so distracted his attention from the things occurring about him as to relieve him from the charge of negligence in his act directly of the exercise of the utmost care was a matter of fact which should have been submitted to the consideration of the jury.

The defendants insist that the evidence submitted at the trial relating to the question of the defendants' negligence or lack of negligence was of such character that the minds of all reasonable men could conclude that the defendants were in fact guilty of no act of negligence which proximately contributed to the accident and the injury which was sustained by plaintiff. It are inclined to the view that the evidence relative to this question also presents a matter that under the law should have been determined by the jury. As stated, the evidence tends to show that the car in question was coming fast at the time plaintiff was struck, that the day was clear, and that there was no other car

obstructions present that in any way limited the power and opportunity of the motorman to see plaintiff where he was engaged at his work about the wagon. The car was approaching a street intersection. The evidence tends to show that Wabansia avenue intersects Western avenue on the west side of that street, that it does not cross Western avenue, but continues east from a point about 150 feet east of the east line of Western avenue; that no bell was rung or warning given by the motorman or other persons in charge of the car of its approach to Wabansia avenue. Under these circumstances it is not perceived how it reasonably can be held as a matter of law that the persons who were operating this car were in the exercise of ordinary care to protect other persons lawfully and rightfully using a public highway. The evidence here referred to stands uncontradicted on this record, and whether the acts and conduct of the motorman who operated the car constituted due and proper care or negligence were, we believe, questions of fact which should have been submitted for the decision of the jury.

> "On the other hand, a street railway company is charged with the knowledge that the public may lawfully use the entire street, and it must, in operating its cars on the streets, employ all reasonable means to avoid injuring those whom it knows may rightfully use that part of the streets occupied by its tracks." North Chicago Electric Ry. Co. v. Feuser, 190 Ill. 67.

> "It is the doctrine of this court that drivers, gripmen and motormen of street cars are obliged to exercise a more exacting attention, when they approach street crossings in a crowded city, where vehicles and pedestrians may always be expected in front of them. The failure under such circumstances to ring the bell, sound the gong, or give other proper warning is undoubtedly evidence of negligence to be submitted to a jury under all the circumstances, whether there is an ordinance requiring such precautions or not." Chicago City Ry. Co. v. Fennimore, 199 Ill. 9, 14.

In view, then, of all the circumstances of this

case we believe that the issues of due care or negligence on the part of the plaintiff as well as of the defendants, were questions of fact for the jury.

The judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

41 - 22317

WILLIAM C. MILLER and
ALFRED HALL, copartners,
trading as Miller & Hall,
Defendants in Error,

vs.

JOSEPH BURNS,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

202 I.A. 221

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to review a judgment of that court in favor of plaintiffs for the sum of $110.

Plaintiffs claim to have been employed by defendant as architects to make plans, drawings, and specifications and to take cost estimates for making certain alterations in defendant's store premises, located at 3958 West Madison street, Chicago.

Alfred G. Hall, one of the plaintiffs, testified at the trial that he had different conversations with the defendant about the proposed work; that the defendant, after showing him the premises in question, told him to go ahead and make a sketch of the work to be done; that he, the witness, made the sketch and submitted and explained it to defendant, and that he and the defendant visited and examined the premises where the work was to be performed; that at the request of defendant the witness had made several notes on the sketch for incorporation in the working drawings which he afterwards prepared; that copies of these drawings with specifications were delivered to different contractors,

JOSEPH BAUER,

Plaintiff in Error.

vs.

Error to
Municipal Court
of Chicago.

Defendants in Error,

Writing an Affidavit of Merit,
CHICAGO MAIL, Corporation,
ALFRED O. BUTLER and

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to review a judgment of that court in favor of plaintiff for the sum of $110.

Plaintiff claims to have been employed by defendant to complete the plans, drawings, and specifications and to take such sketches for making certain alterations in defendant's store premises, located at 3058 West Madison street, Chicago.

Alfred O. Butler, one of the plaintiffs, testified at the trial that he had different conversations with the defendant, and that he and the defendant visited and examined the premises where the work was to be performed; that it was agreed and made a sketch of the work to be done; that he, after showing his the drawings in question, told him to do nothing about the plans; that defendant, after examining the sketch and making some alterations and explaining it to plaintiff, made the sketch and explained it to defendant; that he had different conversations with the

from whom cost estimates were taken for the doing of the work. Hall further testified that the reasonable charges for doing the work done by plaintiffs for defendant were 5 per cent. of the lowest estimates received, and that the lowest estimate submitted amounted to the sum of $4,267. Copies of the plans, drawings and specifications made by plaintiffs were introduced in evidence, and three architects testified that the 5 per cent. charges for the services rendered by plaintiffs were reasonable.

The defendant, Burns, testified in substance that he had talked with Hall about the proposed alterations and that he had asked Hall to give him an estimate for making the changes in the floor only; that he had already made arrangements for the doing of the balance of the work; that he had visited the premises with Hall, and that Hall had delivered to him certain plans; that when he received these plans he said to Hall that he "didn't want nothing like this from you; I didn't ask you for any drawings whatever." Another witness for defendant testified that he heard Hall say to Burns that he, Hall, would make a bid for the floor work.

Counsel for defendant contends that the judgment should be reversed for the reason that the evidence admitted at the trial does not preponderate in favor of the plaintiffs; that the plaintiffs' case rests solely upon the testimony of plaintiffs, which testimony is denied by the defendant; that plaintiffs were not corroborated by any other evidence, and that defendant's testimony was corroborated.

The record discloses that there was evidence taken at the trial which tended to support the testimony

of Hall. It is conceded that he made certain plans and specifications for the changes in defendant's building, and it is not denied that he did take the cost estimates referred to in his testimony. He is also aided in some particulars by the testimony of defendant himself. The jury and the trial judge had an opportunity to hear and to see the witnesses for either side and to judge of their credibility and the reasonableness of their testimony. There is evidence in this record from which the jury might reasonably have found for the plaintiffs as it did, and we do not, under all the circumstances of this case, feel disposed to interfere with the judgment of the trial court. The judgment is therefore affirmed.

AFFIRMED.

51 - 22446

W. A. L. SCHAEFER, a corporation, Appellant,

vs.

BENJAMIN G. ELSER et al., Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

202 I.A. 222

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This case comes here by appeal from a decree of the Superior Court of Cook County.

W. A. L. Schaefer, a corporation, the complainant, filed its bill to foreclose a mechanic's lien against certain real estate of Benjamin G. Elser, the defendant. The parties to the suit had entered into a written contract under which complainant agreed to erect a building on the land of defendant for the sum of $6,925. The work was to be done under the direction and to the satisfaction of Grossman & Proskauer, engineers, and A. Proskauer, an architect. The written contract provided that the complainant was to furnish all materials and perform all the work mentioned in the specifications or shown on the drawings for the mason and brick work of a two-story and basement brick building.

It appears from the evidence taken at the trial that at the time the building was completed, as alleged by complainant, on the 15th day of January, 1914, complainant had received on account of the work performed and materials furnished by it under the contract, the sum of $6,425. Complainant alleged in its bill and attempted to prove that $452 is still due under the contract.

Defendant filed an answer to complainant's bill

H. V. L. SCHAEFER, a corporation,
Appellant,

vs.

ARTHUR G. KLEIN et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

2021A.222

MR. JUSTICE HAYES DELIVERED THE OPINION OF THE COURT.

This case comes here by appeal from a decree of the Superior Court of Cook County.

H. V. L. Schaefer, a corporation, the complainant, filed its bill to foreclose a mechanic's lien against certain real estate of Carlyann G. Klein, the defendant. The parties to the suit had entered into a written contract under which complainant agreed to erect a building on the land of defendant for the sum of $6,425. The work was to be done under the direction and to the satisfaction of Grossman & Trowbauer, engineers, and V. Trowbauer, an architect. The written contract provided that the complainant was to furnish all materials and perform all the work mentioned in the specifications or shown on the drawings for the mason and brick work of a two-story and basement brick building.

It appears from the evidence taken at the trial that at the time the building was completed, as alleged by complainant, on the 15th day of January, 1914, complainant had received on account of the work performed and materials furnished by it under the contract, the sum of $4,425. Complainant alleged in its bill and attempted to prove that $1500 is still due under the contract.

Defendant filed an answer to complainant's bill

in which he alleged that complainant had not completed the work required of it under the terms of the contract and in accordance with the specifications; that the contract provided for damp-proofing the foundation walls of the building and that complainant, without the consent of defendant, had wholly failed to perform this part of the contract; that in the certificate issued to the complainant the engineers had fraudulently allowed the sum of $48 for this failure to do the damp-proofing; that to do this work after the completion of the building would cost the defendant $650.

The case was referred to a master, who in his report recommended the entering of a decree in complainant's favor for the sum of $452 with interest, in accordance with the prayer of the bill. On exceptions to this report the court found that the defendant was in equity entitled to an allowance of $350 instead of the $48 which had been allowed by the master on account of the failure of complainant to carry out the terms of the contract as stated.

On the part of the complainant it is insisted here that the court erred in sustaining any of the exceptions to the report of the master, and that a decree should be directed in accordance with the master's report. The defendant has assigned cross-errors in which it is claimed that he is fairly entitled to a decree dismissing the bill for want of equity.

The evidence heard by the master discloses that the engineers, in September, 1913, issued a certificate to the complainant for the payment of the sum of $500, making therein no allowance to defendant on account of the failure of complainant to perform all of the requirements of the contract; that when this certificate was presented to defendant

in which he alleged that complainant had not completed the work required of it under the terms of the contract and in accordance with the specifications; that the contract provided for damp-proofing the foundation walls of the building and that complainant, without the consent of defendant, had wholly failed to perform this part of the contract; that in the certificate issued to the complainant the engineers had fraudulently allowed the sum of $48 for this failure to do the damp-proofing; that to do this work after the completion of the building would cost the defendant $150.

The case was referred to a master, who in his report recommended the entering of a decree in complainant's favor for the sum of $402 with interest, in accordance with the prayer of the bill. On exceptions to this report the court found that the defendant was in equity entitled to an allowance of $350 instead of the $48 which had been allowed by the master on account of the failure of complainant to carry out the terms of the contract as stated.

On the part of the complainant it is insisted here that the court erred in sustaining any of the exceptions to the report of the master, and that a decree should be directed in accordance with the master's report. The defendant has assigned cross-errors in which it is claimed that he is fairly entitled to a decree eliminating the bill for want of equity.

The evidence heard by the master discloses that the complainant, in September, 1913, issued a certificate to the complainant for the payment of the sum of $402, making therein no allowance to defendant on account of the failure of complainant to perform all of the requirements of the contract; that when this certificate was presented to defendant

he refused to pay the amount thereof until all the work provided for by the contract was performed; that Schaefer, the president of the complainant corporation, then returned this certificate to the engineers, and later presented to defendant two other certificates, one for $400 and one for $52. In these last two certificates it appears that the engineers had made an allowance to defendant of $48 on account of the damp-proofing provision of the contract. Defendant also refused to pay this amount until complainant had completed its contract. Schaefer testified that the work in question was not performed because it would not have been possible to do so without destroying the sidewalk in front of the building, and that the engineers had authorized him to disregard it. Defendant denied having had any knowledge, and it is not contended that the engineers or anyone else ever informed him, of this arrangement.

Defendant was entitled to a complete performance of his contract with complainant before he could rightfully be called upon to make the payments demanded of him. Under the evidence taken by the master it is quite clear that an attempt was in fact made, whether fraudulently or through mistake, to procure payment of the full sum of $6,925 as provided in the contract, without making any allowance whatsoever for complainant's failure to perform a substantial requirement of the contract.

The evidence shows that had the damp-proofing been done while the building was in the course of erection it would have cost the defendant $350, the sum allowed defendant by the chancellor; that to do this work after the completion of the building would have cost the defendant $650. On the whole record we are of the opinion, from the circum-

on the whole record we are of the opinion, that the circumstances of the building would have cast the defendant upon the equitable remedy by the chancellor; that to do this were also to permit it would have cost the defendant upon, the sum allowed to be paid down while the building was in the course of erection

The evidence showed that and the damp-proofing in the contract, although making any allowance whatsoever for the contract.

contractor's failure to perform a substantial requirement of

defendant was entitled to a complete performance of his contract with consideration before he could rightfully be called upon to make the payments demanded of him. Under the evidence taken by the master it is quite clear that on attempt was in fact made, without intentionally or through mistake, to procure payment of the full sum of $4,825 as provided for, to procure payment of the full sum of $4,825 as provided

tended that the engineers or anyone else interested in, of this arrangement.

defendant's denial having had any knowledge, and it is not contended that the engineers had authorized him to disregard it. The defendant denied that the engineers or anyone else interested in, of this arrangement.

defendant was entitled to a complete performance of his contract with consideration before he could rightfully be called upon to make the payments demanded of him. Under the evidence taken by the master it is quite clear that on attempt was in fact made, without intentionally or through mistake, to procure payment of the full sum of $4,825 as provided for, to procure payment of the full sum of $4,825 as provided in the contract, although making any allowance whatsoever for the contractor's failure to perform a substantial requirement of the contract.

The evidence showed that and the damp-proofing

on the whole record we are of the opinion, that the circumstances of the building would have cast the defendant upon the equitable remedy by the chancellor; that to do this were also to permit it would have cost the defendant upon, the sum allowed to be paid down while the building was in the course of erection

The evidence showed that and the damp-proofing

two other certificates, one for $400 and one for $25. In these last two certificates it appears that the engineers had made an allowance to defendant of $75 on account of the sprocketing installation of the contract. Defendant also retained to pay this amount until completed and completed its contract. Chandler testified that the work in question was not performed because it would not have been possible to do so without destroying the sidewalk in front of the building, and

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be refused to pay the amount thereof until all the work pro-

stances attending the omission of the damp-proofing required by the contract, from the attempt made to procure from defendant full payment under the contract notwithstanding the failure of complainant to do this work, and the subsequent allowance of only $48 for an omission in the work which will cost defendant $650 to have supplied, that the defendant, Elser, is not in equity bound to pay the sum of money demanded of him by the complainant.

It is urged by complainant that the contract provides that any controversy or dispute arising under it should be settled by the engineers, whose decision was to be binding upon the parties. This may be agreed to with two exceptions: first, that the decision of the engineers may be impeached for fraud or mistake, and, second, that under the contract itself the binding force of the engineers' decisions were to be regarded as conclusive and binding only in the case of final certificates. The certificates issued by the engineers were not final, and under the terms of the contract were not to be regarded as conclusive of the rights of the parties.

A somewhat different question presents itself when we come to consider the cross-error assigned by defendant. Counsel for defendant insist that defendant is entitled here to the full sum that it would cost him to complete the work which was required of the complainant, and there is but little dispute in the evidence that this cost, after the building was otherwise completed, would have been $650. Defendant did not consent at any time that this feature of the work might be omitted, and it would seem only fair that the allowance to him should be sufficient to enable him to do or to have done the work which complainant should have performed in compliance with

the terms of the contract.

It is insisted by counsel for defendant that if a contract such as is here under consideration is not executed in substantial compliance with its terms, the owner has the right to deduct from the contract price what it would cost him to make the building conform to the plans and specifications agreed upon; and the following authorities are cited in support of this position: Keeler v. Herr, 157 Ill. 57; Evans v. Howell, 211 Ill. 85; 2 Sutherland on Damages (2nd ed.), sec. 711. "The measure of damages is to be sought in the contract made by the parties; and where the amount of compensation is not fixed by the contract, the natural proximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages." Chamberlain v. Parker, 45 N. Y. 569.

We are inclined to agree with counsel in their contention. The rules for the assessment of damages are based, in general, upon the principle of compensation. (2 Sutherland on Damages, supra.) The reason for the rule laid down by the authorities as to the measure of damages in cases of this character, is that the law seeks in cases where there has been a breach of a contract to apply a measure of damages that will enable the court to afford the party injured a remedy that will give him a fair compensation for the loss sustained. The parties here have entered into a contract, and each is bound to a substantial performance of its requirements. Complainant cannot rightfully demand payment until it has in good faith performed the services and furnished the material specified in the contract. This the evidence shows it did not do, and for such failure the defendant should be allowed $650, the sum shown to be neces-

the terms of the contract.

It is indicated by counsel for defendant that if a contract such as is here under consideration is not executed in substantial compliance with its terms, the owner has the right to deduct from the contract price what it would cost him to make the building conform to the plans and specifications agreed upon, and the following authorities are cited in support of this position: Kessler v. Beer, 127 Ill. 37; Evans v. Jarecki, 211 Ill. 85; 2 Sutherland on Damages (3rd ed.), sec. 711. "The measure of damages is to be sought in the contract made by the parties; and where the amount of compensation is not fixed by the contract, the natural proximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages." Cunningham v. Lackey, 49 N. J. L. 329.

We are inclined to agree with counsel in their contention. The rules for the measurement of damages are based, in general, upon the principle of compensation. (2 Sutherland on Damages, supra.) The reason for the rule laid down by the authorities as to the measure of damages in cases of this character, is that the law seeks in cases where there has been a breach of a contract to apply a measure of damages that will enable the court to afford the party injured a remedy that will give him a fair compensation for the loss sustained. The parties here have entered into a contract, and each is bound to a substantial performance of its requirements. Complainant cannot rightfully demand payment until it has in good faith performed the terms and furnished the material specified in the contract. This the evidence shows it did not do, and for such failure the defendant should be allowed just, the sum shown to be necessary

sary for the doing of the omitted work after the erection of the building.

It is our opinion that no error was committed by the chancellor in sustaining the exceptions to the report of the master, and that the defendant is justly entitled to an allowance of $650 on account of plaintiff's failure to fully perform his part of the contract as stated. The decree of the Superior Court will be reversed and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

need for the riding of the unified week after the election of the Dailiting.

It is our opinion that to start the convicted by the Chancellor in enacting the amendments to the report of the session, and that the Parliament is fully entitled to eliminate at once on account of District's failure to fulfil certain duty of the constant as stated. The decree of the Governor could not be removed and the cause removed also directions to dismiss the bill for want of equity.

ROTTAREN AND DIAMOND

Kim Diamond Lyons.

54 - 22455

ANNIE QUINLIVAN, Admx. of the Estate of JAMES QUINLIVAN, Decd., Plaintiff in Error,

vs.

READY & CALLAGHAN COAL COMPANY, Defendant in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

202 I.A. 224

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review the action of the trial court in peremptorily directing a verdict for the defendant at the close of plaintiff's case. The court gave the instruction to the jury upon the theory that when plaintiff closed her case neither the evidence nor any fair inference therefrom tended to establish that the defendant was guilty of any negligence charged in plaintiff's declaration and which was the proximate cause of the injury which caused the death of plaintiff's intestate.

On examination of the evidence it appears that on the 2nd day of September, 1911, a teamster employed by the defendant corporation was driving a sprinkling wagon, to the rear of which was hitched a four-wheel dump wagon, north on Emerald avenue and near the intersection of 31st street. The deceased at the time of the accident was four years and four months of age; he resided with his mother at 3143 Emerald avenue. His mother testified that she had just dressed the child and had told him to remain on the porch of their residence for a few minutes, when she intended to go with him to a store; that she next saw the child about five minutes afterwards in a pool of blood in the street; he was dead at the time.

ANNIE QUINLIVAN, admr. of the .
Estate of JAMES QUINLIVAN, dcsd.. .
.
vs. .
.
THOMAS J. DEVOY, .
.
and .
.
EDWARD TAYLOR, admr. of the .
Estate of CHARLES TAYLOR, dcsd..

IN THE CIRCUIT COURT
FOR CARROLL COUNTY.

AT LAW.

DOCKET 6 CASE 10,324.
Defendants in Error.

No. 10,324 IN THE COURT OF APPEALS OF THE STATE.

OCT 14 1924

This is a writ of error to review the action of the trial court in peremptorily directing a verdict for the defendant at the close of Plaintiff's case. The court gave the instruction to the jury upon the theory that upon plaintiff's own evidence but some evidence the evidence was not only favorable therefrom tended to establish that the defendant was guilty of any negligence charged in plaintiff's declaration and which was the proximate cause of the injury which caused the death of plaintiff's intestate.

It is contended on the part of the defendant that on the 2nd day of September, 1923, a tenantry maintained by the defendant corporation was driving a sprinkling wagon, on the rear of which was fitted a four-wheel dump wagon, part of the Hendrix service and near the intersection of Hat street. The deceased at the time of the accident was four years and four months of age; he resided with his mother at 1121 Decatur avenue. His mother testified that she had just dressed the child and had told him to remain on the porch of their residence for a few minutes, when she intended to go with him to some other place; that the deceased was a bright and lively child and had just entered the street; he was last seen at the time.

Mabel O'Brien, a 14 year old girl, testified that she was out in the street playing tops and that she saw the accident happen; that there were with her at the time seven or eight other children; that she saw deceased coming from his house, about eight o'clock in the morning; that when she first saw him he was with other children on the sidewalk; that a wagon came along, going north, a sprinkling wagon and a dump wagon, the dump wagon being attached to the sprinkling wagon by a shaft; that the little boy "was out there when the wagon came along" and that he "walked fastly towards the wagon and the driver hollered to him to get out of the way and the driver kept on going and the driver was looking towards the horses and he kept going on and the little boy kept running towards the horses." Q "Do you mean running?" A "Walking, and he made a jump to get on the shaft and the wheel got him and he went right over. The rear wagon and the front of it. I couldn't tell you what the driver did. We screamed and he jumped off the wagon. He jumped off, we screamed." Q "What did the little boy do?" Mr. Everett: "I object to that." The Court: "They have admitted that the death occurred by reason of this accident. That makes it immaterial what has happened." Objection and exception.

We are inclined to agree with counsel for plaintiff that it was error for the court to sustain the objection to this question. It was admitted that the deceased's death was caused by his being run over by the dump wagon, but this did not render incompetent testimony as to his conduct and actions at and just before the occurrence of the accident. What the boy then did might well be material in determining whether the accident occurred because of lack of care on the

part of the driver, or from some other cause.

Ella Hornick, a girl 14 years old, testified that she was playing with the other children on the sidewalk at the time of the accident; that she saw the wagon; that she heard the driver shouting "get out of there," and that he kept on going and the little boy walked between the wagons and was knocked down by the front wheel of the rear wagon. Elsie Schott, 14 years old, testified substantially as did the other two witnesses.

The evidence tended to prove that the driver was seated upon a high seat, in such position that he might have seen, had he looked, what these children were doing at the time of and just before the accident; the horses were walking, and the unusual character of the vehicles might well have proved attractive to a child four years of age. The evidence is undisputed that the driver did in fact see these children as he approached them. We hold that it should have been submitted to the jury to determine whether the driver might have anticipated that any one of these young children would under the circumstances do precisely the thing that was done by the deceased, and that by the exercise of reasonable care he, the driver, could have avoided the accident.

On examination of the whole record in this case we are of the opinion that the case should have gone to the jury. In Flood v. Keeley Brewing Co., 175 Ill. App. 441, it appeared that a child 2½ years old left the street curbing and ran into a passing brewery truck; the horses were going at the time at a moderate trot. This court held that under the facts of that case, whether the driver was or was not guilty of negligence was peculiarly and specially within the province of the jury. The driver here had notice that the

part of the driver, or from some other cause.

The decedent, a girl 14 years old, testified that she was playing with the other children on the sidewalk at the time of the accident; that she saw the wagon; that she heard the driver shouting "get out of there," and that he kept on going and the little boy walked between the wagon and was knocked down by the front wheel of the rear wagon. Elsie Abbott, 14 years old, testified substantially as did the other two witnesses.

The evidence tended to prove that the driver was seated upon a high seat, in such position that he might have seen, and he looked, what these children were doing at the time of and just before the accident; the horses were walking, and the unusual character of the vehicles might well have proved attractive to a child four years of age. The evidence is undisputed that the driver did in fact see these children as he approached them. To hold that it should have been submitted to the jury to determine whether the driver might have anticipated that any one of these young children would under the circumstances do precisely the thing that was done by the deceased, and that by the exercise of reasonable care he, the driver, could have avoided the accident.

On examination of the whole record in this case we are of the opinion that the case should have gone to the jury. In Wood v. Tuolumy Express Co., 179 Ill. App. 441, it appeared that a child 11 years old left the street curbing and ran into a passing express truck; the horses were going at the time at a moderate trot. This court held that under the facts of that case, whether the driver was or was not guilty of negligence was peculiarly and especially within the province of the jury. The driver was and must the

children were playing in the street and on the sidewalk, and the jury should have been permitted to determine the question whether his conduct, under the circumstances, did or did not amount to negligence.

For the error of the trial court in the ruling on the admissibility of evidence and in directing the jury at the close of plaintiff's case to find for the defendant, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

74 - 22491

ABRAHAM COHN,
Defendant in Error,

vs.

I. WOLF,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

202 I.A. 225

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Abraham Cohn, brought suit in the Municipal Court against the defendant, I. Wolf. In his statement of claim plaintiff alleged that he had rented to defendant an apartment in his building, 3430 West Washburn avenue, Chicago; that during the last six months of his tenancy defendant had damaged the premises of plaintiff by chopping wood therein, tearing off wallpaper, knocking holes in the plastering and breaking the woodwork.

Trial was had before a jury which returned a verdict in plaintiff's favor for the sum of $56; judgment was entered on the verdict, and defendant by writ of error has brought the case to this court for review.

On the trial three witnesses were sworn who testified for the plaintiff. The testimony of these witnesses fairly tended to prove that at the time defendant took possession of the premises in question they were in good condition and were newly decorated, and that immediately after defendant and his family had vacated them they were found to have been damaged as alleged in plaintiff's statement of claim. Plaintiff himself testified that he had remonstrated with defendant for chopping wood in the rooms, and that defendant had said in substance that he had paid his rent and would do as he pleased. Five wit-

[illegible] COUNT.

[illegible] in favor.

AYE.

[illegible] in favor.

NAYS.

NAYES TO PREVAILED, CLERK

OF CHICAGO.

2052A.252

[illegible] CLERK [illegible] of citizens of the county.

Plaintiff, Gervase Cobb, brought suit in the Municipal Court against the defendant, T. Kelly. In his statement of claim Plaintiff alleges that on [illegible] to deliver an Electric Washing Machine to defendant on Thursday in the morning, 5430 West Washington Avenue, Chicago; that during the last six months of his tenancy defendant has damaged the premises of Plaintiff by [illegible] and breaking the windows, knocking holes in the plastering and breaking the woodwork. Trial was had before a jury which returned a verdict in Plaintiff's favor for the sum of $50; Judgment was entered on the verdict, and defendant by writ of error has brought the case to this court for review.

On two trial Gervase witnesses were sworn who testified for the Plaintiff. The testimony of these witnesses fully bonded to prove that at the time complained of the Premises in question duly were in good condition and were newly decorated, and that immediately after defendant had entered in Plaintiff's tenancy they became filled with [illegible] and were found to have been damaged as alleged in Plaintiff's statement of claim. Plaintiff likewise testified that he had complained with defendant for exhibiting went in the house, and that defendant had said in substance that he did not want any of us to be pleased. Five wit-

nesses were sworn and testified for defendant. Their testimony was in direct contradiction to that of plaintiff's witnesses.

The credibility of the witnesses and the weight to be given their testimony were questions for the jury. Where, as in this case, there is a sharp and apparently irreconcilable confliot in the testimony this court will not disturb the conclusions reached by the jury.

We find no errors in the record which would authorize a reversal of the judgment of the trial court. The judgment will therefore be affirmed.

AFFIRMED.

7 - 22083

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CLYDE TRAVIS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 226

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was proceeded against by information charging that he knowingly caused, aided and encouraged the delinquency of Maud Noell, a female child under the age of eighteen years, contrary to the statute, etc. Defendant waived a trial by jury and the Judge hearing the cause found defendant guilty as charged and sentenced him to imprisonment in the House of Correction for two months.

Defendant complains that the information is insufficient to support the charge and that the evidence does not warrant the conviction. Lacking a motion to quash before the conclusion of the State's case, the information was sufficiently certain in its language to charge the offense of which defendant was found guilty. People v. Jones, 263 Ill. 564.

It is urged that the information charges the offense to have been committed in the city of Chicago, while the proof fails to substantiate such charge. The record shows that defendant met the delinquent first in the city of Indianapolis in the State of Indiana; that at his instigation and suggestion she came to Chicago. By what means she traveled, whether by automobile with defendant or by the railroad without him, is immaterial so far as the guilt of defendant is concerned. When the Noell

far as the guilt of defendant is concerned. When the fact
remains as by the railroad witness Zim, is immaterial to
what means the traveler, whether by automobile with de-
fective or by the railroad without Zim, is immaterial to
the question of what fault, a female child under the
age of eighteen years, contrary to the statute, etc. De-
fendant waived a trial by jury and the judge hearing the
cause found defendant guilty as charged and sentenced him
to imprisonment in the house of correction for two months.

Defendant contends that the information is
insufficient to support the charge and that the evidence
does not warrant the conviction. Having a motion to quash
before the examination of the State's case, the informa-
tion will ordinarily contain in its language to charge the of-
fense of which defendant was found guilty. Trestik v. Jones,
208 Ill. 364.

It is urged that the information charges the
offense to have been committed in the city of Ottawa,
while the proof fails to substantiate such charge. The
record shows that defendant met the gentlemen first in
the city of Indianapolis in the state of Indiana; that at
his invitation and suggestion she came to Ottawa. By
what means the traveler, whether by automobile with de-
fective or by the railroad without Zim, is immaterial to
the question of what fault, a female child under the
age of eighteen years, contrary to the statute, etc. De-
fendant waived a trial by jury and the judge hearing the
cause found defendant guilty as charged and sentenced him
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fense of which defendant was found guilty. Trestik v. Jones,
208 Ill. 364.

It is urged that the information charges the
offense to have been committed in the city of Ottawa,
while the proof fails to substantiate such charge. The
record shows that defendant met the gentlemen first in
the city of Indianapolis in the state of Indiana; that at
his invitation and suggestion she came to Ottawa. By

girl arrived in Chicago, a stranger, knowing not where to go, the defendant instructed her where to go and took her to that place in Chicago. She was without money and defendant paid her expenses, and cohabited with her in an immoral way, at the place in Chicago to which he had taken her. Maud Noell so testified and the circumstances environing the parties and the conduct of defendant lend corroborative support to her testimony. Whatever occurred between the parties in Indianapolis is unimportant; the fact remains that defendant contributed to Maud Noell's delinquency in the city of Chicago as charged in the information.

The testimony of the witnesses for defendant is negative and of no probative force. The trial Judge saw the witnesses for the respective parties, including the erring girl and defendant, and from their manner and appearance upon the witness stand was able to determine the weight to be given to their testimony, and an examination of the proofs in the record leads our minds to the same conclusion as that of the trial Judge - that defendant was guilty of knowingly causing, aiding and encouraging the delinquency of Maud Noell.

Counsel for defendant urge that Maud Noell being admittedly unchaste is not worthy of belief and that her evidence is therefore discredited and should have no weight in determining the case. We are not able to accord our assent to such contention, notwithstanding defendant's counsel in his earnest zeal for his client's cause, urges in the closing paragraph of his brief that "The woman of doubtful morals and of unchaste habits are always of doubtful integrity and are possessed of sinister souls. This

has been the rule since the day Pharoah's wife sought to ensnare Benjamin. Purity and chastity are the handmaids of truth and futile is the search for one where the other can not be found." While we are not unmindful of this stirring appeal, we are somewhat surprised that counsel has erred in the characters involved in what was undoubtedly intended as an illustration from a biblical story. Counsel for the State being no more learned in biblical story than the counsel for defendant, has followed and reiterated this misrecitation. In the interest of accuracy we will remind counsel that Pharaoh's daughter was a chaste maiden who discovered the infant Moses in the bullrushes, and that Benjamin was the youngest child of the patriarch Jacob and of upright life. What counsel evidently intended to call to our attention in an effort to illustrate the point that chastity and veracity are in a sense synonymous, is recited in Holy Writ of Joseph, who, when a prisoner in Egypt resisted the improper and immoral advances of the wife of Potiphar, the Captain of the Guard, who was Joseph's jailer. Chastity and veracity are not in any sense synonymous. One may be unchaste yet truthful; one may be untruthful though chaste. The poet Pope in his poem entitled "Sylvia" has expressed a sentiment in regard to women in these words: "and a mere heathen in the carnal part is still a sad good Christian at her heart"; and all good Christians are truthful, as veracity is a cardinal virtue of christianity.

There is no error in the record justifying a reversal, and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

12 - 22161

JOHN FORREST, Executor of the Estate of Francis Forrest, deceased,
Defendant in Error,

vs.

JOHN F. DELANEY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 228

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The judgment before us for review amounting to $128.75 was confessed upon a warrant of attorney duly executed by defendant. An application to open the judgment and to be let in to defend was made by defendant and granted, and the cause was submitted for trial to the learned Chief Justice of the trial court, who, after hearing the proofs, found the issues for plaintiff and reinstated the original judgment by an appropriate order.

The defense ~~is~~ was want of title in plaintiff to the note in suit. The maker of ~~this~~ the note ~~is~~ was the defendant. The payee ~~is~~ was Mrs. Annie Forrest. It ~~is~~ was dated May 6, 1914, ~~and~~ payable five months after date, ~~and is for $110. The note was is~~ and endorsed as follows:

"Pay to the order of John Forrest. F. A. Forrest, husband of Annie Forrest, now deceased. John Forrest, Executor of the Estate of Francis A. Forrest, deceased. John Forrest."

Annie Forrest predeceased her husband, Francis Forrest. Administration was granted upon her estate by the Probate Court of Cook County. On June 17, 1915, an order was entered in her estate finding inter alia that said deceased left her surviving her husband, Francis Forrest, and no children her surviving; that said Francis Forrest has since died; that his estate is in course of administration

[illegible])
estate of Francis Forrest, de-)
ceased,)
)
Defendant in Error,) NOTICE TO PRINCIPAL,
)
vs.) AGENT OR LICENSEE.
)
John F. [illegible],)
Plaintiff in Error.)

2021.14.228

85. JUDICIAL NOTICE DEFINED FOR APPLICATION BY THE COURT.

The judgment before us for review according to [illegible] was confessed upon a warrant of attorney duly executed by defendant. An appeal action to open the judgment and to be let in to defend was made by defendant and granted, at the time was submitted for trial to the learned Chief Justice of the trial court, who, after hearing the proofs, found the issues for plaintiff and rendered the original judgment by an appropriate order.

The defense ~~he~~ set up in plaintiff to the note in suit. The maker of ~~this~~ note ~~is~~ defendant. The payee ~~is~~ was Annie Forrest. It ~~is~~ dated May 6, 1914, and ~~was~~ payable five months after date, ~~and is for $150. The note~~ ~~is~~ endorsed as follows:

"Pay to the order of John Forrest. (S.) A. Forrest Husband of Annie Forrest, now deceased. John Forrest, Executor of the Estate of Francis A. Forrest, deceased. Julian Forrest."

Annie Forrest predeceased her husband, Francis Forrest. Administration was granted upon her estate by the Circuit Court of Cook County. On June 17, 1915, an order was entered in our estate finding inter alia that said deceased left her surviving her husband, Francis Forrest, and no children her surviving; that said Francis Forrest has since died; that his estate is in course of administration

in said court; that all of the assets of the estate were in the possession of the executor of the estate of Francis Forrest, deceased; that the best interests of both estates can be conserved by and through the administration of the estate of Francis Forrest; and ordering that the administratrix of the wife's estate be excused from filing an inventory, making publication for claims, and discharging the administratrix from further duty. Proof of grant of letters testamentary to John Forrest upon the estate of Francis Forrest was also made.

We think title to the note was sufficiently established in plaintiff by the foregoing evidence. Subject to the payment of debts and the costs and expenses of administration, the personal property of a wife leaving a husband surviving, but no descendants, vests in the surviving husband. The wife died possessed of the note, and by virtue of the laws of descent in this State, she having died without leaving descendants, her husband surviving her, the title to the note vested in the husband. After the husband's death plaintiff came into its possession as executor of his will and estate. Moreover, the Probate Court found as a fact that plaintiff was in possession of all the assets of the wife's estate and ordered plaintiff to administer the assets of both estates together, so that plaintiff had two sources of title to the note, either one of which was sufficient to enable this action to be maintained. Title to the note vested in plaintiff without any endorsement.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

AFFIRMED.

The judgment of the District Court is affirmed.

the note vested in plaintiff without any encumbrance.

Plaintiff is entitled to have title to the note, either as owner or as holder of such estates together, so that plaintiff has two sources of title to the note, either one of which was sufficient to enable plaintiff to maintain. Title to the note vested in plaintiff without any encumbrance.

The judgment of the District Court is affirmed.

353 - 22308

JAMES EDWARDS,
Appellee,

vs.

PREST-O-LITE COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

202 I.A. 233

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $2250 entered upon the verdict of a jury in favor of plaintiff and against defendant in an action for personal injury.

Plaintiff and defendant on July 1, 1913, each owned a motor truck. The declaration charges - which the proof sustains - that plaintiff at the time of the occurrences complained about, was making repairs upon the chassis of his motor truck; that the chassis was in a certain public highway or alley in the City of Chicago running north and south between Michigan and Indiana avenues, in the rear of No. 2735 South Michigan avenue; that while plaintiff was in the exercise of due care for his own safety and that of his property, defendant drove and propelled his auto-truck, while running north in said alley, in such a careless and negligent manner that it came in violent collision with the chassis of plaintiff's truck, damaging the same and injuring plaintiff severely.

Among the errors assigned is the refusal of the trial Judge to instruct a verdict in favor of defendant on its motion made at the time when plaintiff closed his proof and again at the conclusion of all the proofs. In the condition of the evidence when these motions were made, it was a question of fact for the jury to determine

JAMES EDWARDS,

Appellee,

vs.

ZANESVILLE-CLIFTON COMPANY,

a corporation,

Appellant.

No. 10811A MOTION ENTERTAINED FOR DISMISSAL OF THIS CAUSE.

This is an appeal from a judgment for $2500

entered upon the verdict of a jury in favor of plaintiff and against defendant in an action for personal injury.

Plaintiff was delivering on July 7, 1913, some

damaged a motor truck. The declaration charges - Motor Car

proof sustains - that plaintiff at the time of the occur-

rences complained about, was working relative upon the

chassis of his motor truck; that the wrench was in a

certain public highway or alley in the city of Cleveland

running north and south between Scranton and Columbus ave-

nues, in the rear of No. 1238 Scranton avenue; that

while plaintiff was in the execution of the duty for the

time being and just at the moment, defendant drove his

automobile into contact with the wrench, whereby plain-

tiff, in some manner not explained by the record, was se-

riously injured.

Upon the errors relied on for reversal of

the trial judge to instruct a verdict in favor of defend-

ant on the motion made at the time when plaintiff closed

his case and again at the conclusion of all the proofs.

In the condition of the evidence when these motions were

made, it was a question of fact for the jury to determine

whether plaintiff was in the exercise of ordinary care,

considering the case and inducing plaintiff naturally,

in view of existing conditions and the duties of plaintiff's

employment, to assume that it was safe to do what he did

at the time of the accident, and whether or not defend-

ant, in the exercise of due care for the safety of plain-

tiff, in the case of a derelict and unsafe wrench, must

have foreseen that the natural result in such a case

would be that plaintiff, merely assuming safety in his

employment, would proceed to do what he did do, and

whether or not defendant was guilty of negligence in

failing to remove the wrench from the place where it was

2023 L.A. 233

whether plaintiff had made such a case as under the issues joined by the pleadings entitled him to recover. It was not error to refuse to instruct a verdict for defendant.

Defendant offered in evidence Sections 2436 and 2494 of the Municipal Code of Chicago, and they were received as part of defendant's defense. Section 2436 reads:

"Obstructions. Vehicles. No person being the owner, or having the charge or control thereof, shall permit any wagon, sleigh, sled, carriage, or vehicle of any kind or description, or any part of the same, without horses or other beasts of burden attached, to remain or stand in any street of this city under a penalty of not less than $1 nor more than $25 for each offense. * * *"

Section 2494 is as follows:

"Traffic not to be obstructed. No vehicle shall be allowed to remain upon or drive through any street of the City of Chicago so as to blockade or obstruct the traffic on the street."

That plaintiff was obstructing the alley at the time defendant's auto struck the chassis of plaintiff's truck is not denied, but is on the contrary admitted by plaintiff. The dispute between the parties relates solely to the degree of such obstruction.

We do not think it necessary to decide whether the ordinance is applicable to alleys or not, because the obstruction by plaintiff of the alley was in no sense the proximate cause of the accident. The cause of the accident was the negligent driving of defendant's truck. The testimony as to how much of the alley plaintiff was obstructing is in conflict. Plaintiff testified to four feet and defendant's witness to twelve feet; but wethink whether four or twelve feet is immaterial as affecting the negligence attributable to defendant by reason of his truck having struck the chassis on which plaintiff was working. The width of the alley at the point of collision was twenty-one feet; defendant's truck was about

seven feet in width; there were, therefore, at least nine feet in which to clear the seven foot truck without striking the chassis. This was ample room for any driver not recklessly negligent. The striking of the chassis was the result of the negligent driving of the truck, and this negligence the jury might properly find was the proximate cause of the accident and the resulting injuries to plaintiff.

The judgment is supported by the evidence.

An examination of the instructions criticised does not disclose any error justifying a reversal of the judgment. The instructions, taken as a series, fairly present the theories of both the parties, and we think the jury were sufficiently instructed on every essential point embodying the law applicable to the defense made by defendant. But two instructions were proffered by plaintiff, while thirty-four were tendered by defendant, twenty-three of which were given. Defendant has no just cause of complaint in this regard.

The damages are but modestly compensatory for the injuries sustained by plaintiff, which are attributable to the negligence charged against defendant.

We think the following observations made by the court in W. C. S. Ry. Co. v. Maday, 188 Ill. 308, are fairly in point in this case:

"When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect of a harmless character was obviated, so as not to affect injuriously in the final judgment the rights of the party against whom the error was committed, it should not be allowed to work a reversal."

The judgment of the Circuit Court does justice between the parties, and it is therefore affirmed.

AFFIRMED.

49 - 22444

JAMES J. WHITE & COMPANY,
a corporation,
Plaintiff in Error,

vs.

BERTHA N. de TARNOWSKY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 234

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $60 against defendant on a finding by the trial Judge, to whom the cause was submitted for trial without a jury. Neither disputant being content with the result of the struggle in the trial court, plaintiff seeks this review on the contention that the court failed to award it all it was entitled to recover, and defendant assigns cross errors, contending that plaintiff has no cause of action and that the trial Judge should have so determined.

We think the rights of the parties are envirnned within the contention that the minds of the parties did not meet in the making of the contract set out in the statement of claim as shown by the evidence of plaintiff. We are of the opinion that the minds of the parties did not meet and that the evidence fails to show that the parties entered into the alleged contract in suit for the reasons hereinafter made manifest.

Defendant is the daughter of the late William Penn Nixon, who in his lifetime was active and well known in public life and in newspaper circles in Chicago. Plaintiff is the publisher of the "National Encyclopedia of American Biography." On May 31, 1913, defendant made a written proposal to plaintiff to have it insert in a volume of its en-

JAMES J. KING & COMPANY,
a corporation,
Plaintiff in Error;

vs.

ARMIDA S. de CARPENTIER,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $50 against defendant on a finding by the trial Judge, to whom the cause was submitted for trial without a jury. Neither disputes being content with the result of the struggle in the trial court, plaintiff seeks this review on the contention that the court failed to award it all it was entitled to recover, and defendant assigns cross errors, contending that plaintiff has no cause of action and that the trial Judge should have so determined.

We think the rights of the parties are subserved while the conclusion that the minds of the parties did not meet in the making of the contract set out in the statement of claim as shown by the evidence of plaintiff. We are of the opinion that the minds of the parties did not meet and that the evidence fails to show that the parties entered into the alleged contract in suit for the reasons hereinafter more specifically.

Defendant is the executor of the late William Penn Nixon, who in his lifetime was active and well known in public life and in newspaper circles in Chicago. Plaintiff is the publisher of the "National Encyclopedia of Information." On May 24, 1913, defendant made a written request to plaintiff to have it insert in a volume of the en-

cyclopedia "a full page half tone portrait to accompany the biography of William Penn Nixon," etc. There are some endorsements on the back and made a part of the contract, among which ~~is,~~ was "Will decide soon and send photo desired." While plaintiff thereafter acknowledged to defendant the receipt of her order, the acceptance was not in the terms of the order, but varied from it in a material particular. On July 2, 1913, defendant cancelled the order by mail ~~from her residence in Florence, Italy.~~ The acceptance ignored the condition that defendant reserved the right to send a photo from which the half tone should be made, and put forth a new condition, viz: that the contract price should be payable "on submission of proof." ~~This was an entirely new condition and a material departure from the proposal made by defendant, which reserved to herself the right to have the half tone made from such protrait of her father as she might furnish.~~ This new condition interpolated by plaintiff was never accepted by defendant. Consequently there was no contract between the parties and there can be no recovery in this action.

To constitute a contract in the circumstances narrated and appearing from the statement of claim and the evidence of plaintiff found in the record, it was necessary that defendant, by acceding to and accepting unequivocally the new condition imposed by plaintiff regarding the half tone, should have waived her right to herself furnish a photo. This new condition in effect transferred the right imposed by defendant in her proposal, to have the half tone made from a photo to be furnished by her, to her consent that the half tone to be published with the biography should be made from some other source at the will

encyclopedia "a full page half tone portrait to accompany the biography of William Lane Wilson," etc. There are some endorsements on the back and made a part of the contract, among which [illegible] "will decide upon and send photo desired." While plaintiff thereafter acknowledged to defendant the receipt of her order, the acceptance was not in the terms of the order, but varied from it in a material particular. On July 2, 1913, defendant cancelled the order by mail ~~from her residence in Florence, Italy.~~ The acceptance ignored the condition that defendant reserved the right to send a photo from which the half tone should be made, and put forth a new condition, viz: that the contract ~~was~~ prior should be payable "on submission of proof." ~~This was an entirely new proposition and a material departure from the previous made by defendant~~, which reserved to herself the ~~right to have the half tone made from some portrait of her~~ ~~father or wife she might choose.~~ This new condition interjected by plaintiff was never accepted by defendant. Consequently there was no contract between the parties and there can be no recovery in this action.

To constitute a contract ~~the~~ in circumstances narrated and ~~upon~~ arising from the statement of claim and the evidence of plaintiff found in the record, it was necessary that defendant, by accepting to and accepting unequivocally the new condition imposed by plaintiff regarding the half tone, should have waived her right to herself furnish a photo. This new condition in effect transferred the right imposed by defendant in her proposal, to have the half tone made from a photo to be furnished by her, to her consent that the half tone to be published with the biography should be made from some other source at the will

and pleasure of plaintiff. This condition in the acceptance was such a material departure from the condition contained in defendant's proposal as in law constituted a new offer, requiring its unequivocal acceptance by defendant to make a contract binding upon the parties.

It is elementary law in this class of cases that to make a contract the proposition made must be unconditionally accepted. The interpolation of any new condition or any departure from the exact terms of the proposition in any written acceptance constitutes a new offer, and before the parties are bound, such new offer must be unconditionally accepted by the party making the original proposition. Maclay v. Harvey, 90 Ill. 525; Rugg v. Davis, 15 Ill. App. 647; Sec. 136 Story on Sales.

In Rugg v. Davis, supra, the court quote from Parsons on Contracts, who states the principle thus:

"The assent must comprehend the whole of the proposition; it must be exactly equal to the extent and provisions, and it must not qualify them by any new matter. The respondent is at liberty to accept wholly or reject wholly; but one of these things he must do, for if he answers not rejecting, but proposing to accept under some modifications, this is a rejection of the offer."

The principle as stated by Mr. Presiding Justice McSurely in U. S. Lithographic Co. v. American Iron Machine Co., case general number 22243, not yet reported, and his reasoning thereon, are precisely as applicable to the conditions found in this case as in that. He says:

"Where one offers to do a definite thing and another accepts it conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to negotiate further or it is a counter proposal, but in neither case is there a contract. This rule is supported by such an abundance of authority as to make further comment unnecessary. This is also the rule even if the differences may not be of great importance in the mind of one of the parties. The test as to the fact of a contract does not depend upon the greater or less degree of difference between the parties; the acceptance must be in

and clearance of plaintiff. This condition in the acceptance was such a material departure from the condition contained in defendant's proposal as in law constituted a new offer, requiring the unequivocal acceptance by defendant to make a contract binding upon the parties.

It is elementary law in this class of cases that to make a contract the proposition made must be unconditionally accepted. The interpolation of any new condition or any departure from the exact terms of the proposition in any written acceptance constitutes a new offer, and before the parties are bound, such new offer must be unconditionally accepted by the party making the original proposition. Mechay v. Perry, 99 Ill. 568; Hunt v. Irvin, 13 Ill. App. 647; Sec. 156 Story on Sales.

In Hunt v. Irvin, supra, the court quote from Parsons on Contracts, who states the principle thus:

> "The assent must comprehend the whole of the proposition; it must be exactly equal to the extent and provisions, and it must not qualify them by any new matter. The recipient is at liberty to accept wholly or reject wholly; but any at these things he must do, for if he answers not precisely, but proposing to accept under some modification, this is a rejection of the offer."

The principle as stated by Mr. Presiding Justice Bouvery in W. B. Dickerman Co. v. American Iron Hooking Co., case pressed number 25343, not yet reported, and his remarks on the case, are precisely as applicable to the conditions found in this case as in that. He says:

> "There are offers to do a definite thing and another accepts it conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to negotiate further or it is a counter proposal, but in neither case is there a contract. This rule is supported by such an abundance of authority as to make further comment unnecessary. This is also the rule even if the differences may not be of great importance in the mind of one of the parties. The test as to the fact of a contract does not depend upon the greater or less degree of

the identical terms contained in the offer."

As it is clear that measured by the legal principles referred to, there is no contract between the parties upon which any recovery can be had, it follows that whatever plaintiff did in the matter in the belief that there was a contract was a mere gratuity, compensation for which cannot be enforced by the processes of the law.

The judgment of the Municipal Court is reversed, and as no enforceable contract exists between the parties regarding the subject matter of this suit, a judgment of nil capiat and for costs will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT HERE.

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As it is plain that asserted by the legal princi-
ples referred to, there is no contract between the parties
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plaintiff did in the matter in the belief that there was a
contract and a more gratuity, consideration for which cannot be
enforced by the processes of the law.

The judgment of the Municipal Court is reversed,
and as no enforceable contract exists between the parties re-
garding the subject matter of this suit, a judgment of nil
capiat and for costs will be entered in this court.

REVERSED AND JUDGMENT OF NIL
CAPIAT ENTD.

52 - 22449

FRANK I. BENNETT et al.,
Plaintiffs in Error,

vs.

JOHN SYDNEY BAXTER,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 236

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of defendant rendered upon the verdict of a jury.

The transactions involved in this suit need not be recited in this opinion, because the whole controversy centres upon the contention of defendant that plaintiffs agreed to release him from the payment of an interest charge of $112.85, which he admittedly owed to the plaintiffs.

The plaintiffs traded under the name of the "Highlands Company," and defendant contends that George R. Bennett, one of the plaintiffs, released him from the payment of the interest sued for. In the first place, at the time this release was made George R. Bennett was not a partner in the Highlands Company and had no authority to relieve defendant from his liability; and in the second place, the promise was without consideration and for that reason unenforceable. Such a promise would not work an accord and satisfaction even if made with authority, because there was no dispute as to the amount due. An agreement to receive a lesser amount in settlement of an undisputed debt will not satisfy the debt. Ostrander v. Scott, 161 Ill. 339; Jackson v. Security, etc. Co., 233 ibid 161.

The judgment is neither supported by the evidence nor justified by the pleadings and must therefore be reversed.

PEARL I. CLEMENT et al.,
Plaintiffs in Error,

vs.

JOHN ANTHONY BACCHA,
Defendant in Error.

ERROR TO DISTRICT COURT
OF CHEYENNE.

2032 I.L. 236

Mr. Justice BURKE delivered the opinion of the Court.

This is an appeal from a judgment in favor of defendant rendered upon the verdict of a jury.

The transactions involved in this suit need not be recited in this opinion, because the single controverted question upon the construction of defendants' plea of estoppel to release his from the payment of $112.50, which be admittedly owed to the plaintiffs.

The plaintiffs traded under the name of the "Highlands Company," and defendant contends that George B. Bennett, one of the plaintiffs, released him from the payment of the interest owed for. In the first place, at the time this release was made George B. Bennett was not a partner in the Highlands Company and had no authority to relieve defendant from his liability; and in the second place, the promise was without consideration and for that reason unenforceable. Such a promise would not work an estoppel and declarations even if made with authority, because there was no dispute as to the amount due. An agreement to receive a lesser amount in payment of an undisputed debt will not satisfy the debt. Cutsinger v. Monti, 141 Ill. 390; Jackson v. Dockrill, 7 Fed. 65. See also 141.

The judgment is neither unsupported by the evidence nor justified by the pleadings and must therefore be reversed.

The plaintiffs moved for judgment non obstante verfdicto, which was denied. This motion presents for our consideration and decision the propriety of the court's ruling in denying the motion and our duty either to make our conclusion a finality or send the cause back for a new trial.

The defense embodied in the affidavit of merits, defendant's pleading in the action, did not state facts which if uncontradicted would entitle defendant to prevail. The affidavit states that there was an accounting between the parties and the amount of defendant's indebtedness settled in that accounting, that the amount thus agreed upon was to be secured by a mortgage, and that the negotiating of that mortgage resulted in the payment of commissions. As to whom such commissions were paid the affidavit sheds no light. Such an expense, unexplained, is the mortgagor's, and no intendment to the contrary can be indulged in the absence of any direct statement concerning it. It is therefore apparent that a motion to strike the affidavit as presenting no meritorious defense, if made, must have been granted. Likewise, a motion to instruct a verdict for plaintiffs for the amount of their claim, if made, should have been granted. In the condition of the pleadings there was no meritorious defense either of fact or law presented by the pleading of defendant. The situation as outlined meets the legal requirement held in Aldrich v. Mathias, 141 Ill. App. 590, to be essential as matter of law to justify the granting of a motion to enter a judgment for plaintiff non obstante verfdicto. Plaintiffs were entitled to judgment upon the pleadings as they were at the time the motion for a judgment non obstante verfdicto was

per time the motion for a judgment non obstante veredicto as applied to judgment upon the pleadings as they were at that stage, but operate non obstante veredicto. Judgments were rendered for plaintiffs for the amount of their claim, if made, should have been granted. In the condition of the pleadings there was no materiality between at least as we outlined above the legal requirement made in Virginia v. Deming, 141 III. App. 302, to be essential as matter of law for plaintiff to recover. The pleadings in no way showed the legal relationship between the parties. The motion to strike the affidavit as presenting no meritorious defense, if made, must have been granted. Likewise, a motion to instruct a verdict for plaintiffs for the amount of their claim, if made, should have been granted. In the condition of the pleadings there was no materiality between at least as we outlined above the legal requirement made in Virginia v. Deming, 141 III. App. 302, to be essential as matter of law for plaintiff to recover. Judgments were rendered

made. The principle applicable here is well stated in 11 Ency. Pleading and Practice, 912, thus:

"At common law a judgment non obstante verdicto could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. In such a case the plaintiff was entitled to a judgment in his favor, notwithstanding a verdict for the defendant."

As the affidavit of merits did not present "either a defense or a bar to the action," plaintiffs were entitled to a judgment notwithstanding the verdict of the jury.

While the trial in the Municipal Court was by jury, yet in the state of the pleadings defendant was not entitled to a jury trial. There were no damages requiring assessment by a jury. We enter judgment here because the claim is not unliquidated, but liquidated, and for an amount which is certain and fixed. As said in Mann v. Brown, 263 Ill. 394:

"It does not appear that plaintiffs in error made any effort, in any manner, to reduce the damages below the face of the bond, and we do not see how it could make any difference to them whether the damages were assessed by the court or a jury. * * We fail to see how the judgment could be for any different or less amount on the face of the record. If it was error for the court to assess the damages it does not appear that any injustice was done plaintiffs in error thereby, and such an error affords no justification for reversing the judgment."

If defendant is liable at all it is for $112.85 due April 28, 1914, for interest on a balance of $2500 unpaid on his two notes for $1250 and $2250 each.

The judgment of the Municipal Court is reversed and a judgment entered in this court for $127.57, being for $112.85 with interest thereon at five per cent per annum from April 28, 1914, to the date of the filing of the opinion.

REVERSED AND JUDGMENT HERE FOR $127.57.

56 - 22459

LIZZIE BASKES,
Plaintiff in Error,

vs.

EVENING AMERICAN PUBLISHING COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 238

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat in an action for personal injuries.

The injuries for which compensation is sought in this action were alleged to have been inflicted on June 19, 1913. The action was commenced July 28, 1914, and the parties joined as defendants in the action were the Illinois Publishing Company, Chicago American and Chicago Examiner. The Illinois Publishing Company was served with process; the Chicago American and the Chicago Examiner were never so served. On March 4, 1916, the plaintiff dismissed the suit as to the defendants Illinois Publishing & Printing Company and Chicago Examiner. January 14, 1916, the Evening American Publishing Company was made a party defendant and summons issued against it and served upon it January 26, 1916. This defendant, the Evening American Publishing Company, in its affidavit of defense, set out as a defense "that the said supposed causes of action set out in plaintiff's statement of claim as amended, did not accrue to plaintiff at any time within two years next prior to the commencement of this action, to-wit: the filing of plaintiff's statement of claim as amended on January 17, 1916." Plaintiff sought to avoid the effect of the defense of the statute of limitations thus interposed by averring in substance in reply that defendant, Evening American Publishing Company,

Plaintiff in Error,

vs.

Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

No. 20821/2538

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is an action for a balance of rent claimed to be due under a lease for personal injuries.

The injuries for which recompensation is sought in this action were alleged to have been inflicted on June 19, 1912. The action was commenced July 20, 1912, and the pleadings were completed on the action were the fifteenth Municipal Court, Chicago, Division One, American and Chicago Investing Company, defendant in error, a corporation, was served with process; the Citizens Building Company was served with process; the Citizens Building Company was served with process; the Citizens Building Company

traded as the Chicago American. On motion of defendant, Evening American Publishing Company, the suit was dismissed as to it.

It is beyond contradiction that the first time the Evening American Publishing Company was brought into the suit was January 14, 1916, and it therefore follows that the statute of limitations at that time had barred the action against it, of which it might advantage by an appropriate pleading. On the date mentioned the action was initiated against it, and plaintiff so treated the amendment by making the Evening American Publishing Company an additional defendant, causing process to be issued against it and serving the same upon it. What plaintiff intended will not arrest the running of the statute; it is what she did that controls. The Chicago American was not the Evening American Publishing Company. But were the converse of this proposition true, no service of process was had upon the Chicago American and no notice of the cause of action received or made known to the Evening American Publishing Company until the service of summons upon it in this action, which was some time after the statute of limitations had been tolled. This precise question was decided in Proctor v. Wells, 181 Ill. App. 468, against the contention of plaintiff. This decision was on further review affirmed in an opinion which appears in 262 Ill. 77. The commencement of an action against the Chicago American was not the commencement of an action against the Evening American Publishing Company, and the trial court properly sustained the defense of the statute of limitations.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

AFFIRMED.

The judgment of the Municipal Court is affirmed.

77 - 22495

SARAH J. KELLY,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

202 I.A. 239

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries tried before a Judge of the Municipal Court without the intervention of a jury, there was a finding for defendant and a judgment in its favor and against plaintiff for costs, of which judgment plaintiff seeks this review and asks a reversal.

This is a passenger and carrier case in which plaintiff, the passenger, claims that while attempting to alight from defendant's car after the same had completely stopped she was thrown to the ground and injured by the starting of the car with a sudden jerk. Defendant contends plaintiff was thrown and injured in attempting to leave the car while it was in motion and before it had stopped. Plaintiff argues three points, assigned as error, as reasons for reversal, viz: The action of the trial Judge in denying plaintiff's motion for a non-suit, in entering judgment, and in overruling a motion for a new trial.

In a trial before the court without a jury no error can be assigned on the failure of the court to grant a motion for a new trial, because no such motion is necessary, as the error, if any, in such condition arises on the court's finding and the entry of judgment thereon. Climax Tag Co. v. American Tag Co., 234 Ill. 179.

MARIE C. KELLY,
Plaintiff in Error,
vs.
CHICAGO CITY RAILWAY COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

2021 IL 239

Mr. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries tried before a judge of the Municipal Court without the intervention of a jury, there was a finding for defendant and a judgment in its favor, and plaintiff for costs, of which judgment plaintiff seeks this review and asks a reversal.

This is a passenger and carrier case in which plaintiff, the passenger, claims that while attempting to alight from defendant's car after the same had completely stopped she was thrown to the ground and injured by the operating of the car with a sudden jerk. Defendant contends plaintiff was thrown and injured in attempting to leave the car while it was in motion and before it had stopped. Plaintiff offered three sworn points, analogous as stated, as reasons for reversal, viz: The motion of the trial judge to decide plaintiff's motion for a non-suit, in entering judgment, and in overruling a motion for a new trial.

In a brief before the court without a jury no error can be assigned on the failure of the court to grant a motion for a new trial, because no such motion is necessary. On the error, if any, in such condition exists on the court's finding and the entry of judgment thereon. Illinois Tug Co. v. Hamilton Tug Co., 234 Ill. 170.

We cannot say from the evidence in the record that the judgment is not supported by such evidence. We think it is. The testimony of the witnesses for the contestants is in sharp conflict. If the witnesses for defendant were credible the trial Judge was justified in resting his finding on their testimony. The situation of the trial Judge, who saw the witnesses and observed their manner of testifying, their appearance of fairness or bias, if either was made evident, was superior to ours, having before us only the unresponsive record. Therefore we are not at liberty to disturb the finding unless we can say that such finding is manifestly contrary to the probative force of the evidence, and this we are not able to do.

Plaintiff, after the trial Judge had announced his finding and the same had been entered, moved for a non-suit. Such motion came too late to be effective. The right to a non-suit thus requested is controlled by Sec. 30, Chap. 37, R. S., which reads:

"Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

It was held in Kaiahkowski v. Bostrom, 193 Ill. App. 12, that a motion for a non-suit in a case tried without a jury could not be entertained after the trial judge had announced his findings and declared his decision of the case, and this court reversed the judgment of the trial court for allowing such motion.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

279 - 21675

MARGARET BOYD,
Defendant in Error,

vs.

ARTHUR FOSTER,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

202 I.A. 251

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below) brought suit against plaintiff in error (the defendant) whom she had employed as an architect to design, plan, and superintend the construction of a building in Chicago, and, as also alleged, the construction of the adjoining sidewalk, to recover damages for alleged negligence whereby the construction of both was at a grade below that established by the city. During the course of construction of the building the error was discovered, and it became necessary in order to have the sewer laid below the basement floor to raise the latter. The basement walls, however, were not heightened, which resulted in a somewhat lower ceiling in the basement, and also, as the sidewalk had to be relaid and raised to grade, in bringing the first floor on a level with the street grade and necessitating the construction of bulkheads about the basement windows.

Evidence was introduced which made it a question of fact for the jury whether plaintiff had assented to the continuance of the work of construction on the building without other changes. The jury presumably found that

without other charges. The jury reasonably found that
continuance of the work of construction on the building
of fact for the jury whether plaintiff had assented to the
changes was introduced which made it a question
the construction of pulpwood about the basement windows.
first floor on a level with the street grade and necessitating
walk had to be raised and raised to grade, in bringing the
most lower ceiling in the basement, and also, as the side-
doorway, were not heightened, which resulted in a consi-
raise the latter. XXXXXXXXXXXXXXXXX The basement walls,
order to have the sewer laid below the basement floor to
ing the error was discovered, and it became necessary in
the city. During the course of construction of the build-
struction of both was at a grade below that established by
recover damages for alleged negligence whereby the con-
alleged, the constructing of the adjoining sidewalk, to
the construction of a building in Chicago, and, as also
employed as an architect to design, plan, and superintend
against plaintiff in error (the defendant) whom she had
Defendant in error (plaintiff below) brought suit

MARGARET SCOTT,
Defendant in Error,

vs.

AGNESS SCOTT,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

274 - 21675

2 D.C.A. 251.

ED. OPINION DELIVERED AND CONCURRED THE OPINION OF THE COURT.

there was no such consent, for they assessed damages in the sum of $543.

One of the grounds of error urged is that there was no competent proof of damages. No rule for measuring damages was given to the jury. The one relied on by plaintiff was that of the reasonable cost of restoring the property to the condition contemplated by the accepted plans, by raising the basement walls in conformity therewith. But even if that were the correct rule, - as to which we express no opinion for the matter is not properly presented on the record for our consideration, - still the proof adduced and received over defendant's objection was wholly incompetent to support plaintiff's theory. It merely consisted of the testimony of a builder, not as to reasonable cost of such work, but merely to the effect that two years previous he proposed to make such change for $540. For aught the court or jury could tell that sum may have greatly exceeded a reasonable cost of the work.

Defendant in error argues that plaintiff in error cannot now avail himself of his general objection to such testimony, not having made as a specific ground thereof that such price was not shown to be reasonable. A specific objection is unnecessary where it is manifest that the offered proof has no probative value whatever. It was inadmissible under any rule for the assessment of damages. There having been no legal evidence from which the jury under any recognized rule could have assessed damages the court erred in not granting a new trial. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

CLASSIFIED ADVERTISING.

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378 - 21775

J. H. JOHNSON,
Defendant in Error,

vs.

JAMES HOGG,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

202 I.A. 253

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record before us is that of a case tried before the court without a jury in the Municipal Court of Chicago, wherein judgment was rendered for the plaintiff.

The statement of claim alleged that there was a written contract between the parties whereby plaintiff agreed to construct for defendant a building according to certain plans and specifications for a certain price; that the contract provided that the work was to be done under the direction of the architect and that his decision was to be final, that the payments were to be made only upon the architect's certificates, and that the final certificate should be conclusive evidence of the performance of the contract. It further alleged the issuance of a final certificate under the contract and refusal of defendant to pay. Defendant filed his affidavit of merits and a set-off.

Notwithstanding that on the facts pleaded in the statement of claim defendant would be limited to the defense of fraud or mistake in the issuance of the final certificate (Concord Apartment House Co. v. O'Brien, 228 Ill. 360, and cases cited) yet without denial of a single one of those allegations of fact, except that the construction was not

according to the plans and specifications, - which, however, in the absence of fraud or mistake, was immaterial if, as alleged, the contract made the architect's decision thereon final - the affidavit of merits and set-off, both set forth numerous facts, evidentiary and otherwise, pertaining mostly to improper and defective construction and complaints of the owner on the subject, and stated as a conclusion therefrom (1) that the plaintiff "waived and suspended the operation of said final certificate" and (2) that "said architect issued said certificate in consequence of the mistake as to the actual condition of said walls, floors and elevator pit, and that said mistake was the result of said misrepresentations, concealment and fraudulent omissions of plaintiff's employes in charge of said work, to disclose to said architect the defects as aforesaid," and (3) that the terms of the contract had not been fulfilled and that to complete it "in accordance with the terms and conditions of the contract and specifications" would reasonably cost $950.

Tested by the principles of pleading applicable in other courts of record, the affidavit of defense did not meet the issues tendered by the statement of claim; and, tested by the principles of law applicable to such a contract as plaintiff pleaded, it did not plead facts that constituted a legal defense. Had the attention of the trial judge been called to such situation by some proper motion, the court might have been saved the time and expense of hearing evidence that covers over 300 typewritten pages that under its holdings of law, was unnecessary to its ultimate decision, and which under such circumstances we should not be called on to review.

Defendant's pleading concedes it was a final

according to the plans and specifications, - which, however, in the absence of fraud or mistake, was immaterial if, as alleged, the contract made the architect's decision thereon final - the affidavit of merits and set-off, both set forth numerous facts, evidentiary and otherwise, pertaining mostly to improper and defective construction and omissions of the owner on the subject, and stated as a conclusion therefrom (1) that the plaintiff "waived and suspended the operation of said final certificate" and (2) that "said architect issued said certificate in consequence of the mistake as to the actual condition of said media, floors and elevator pit, and that said mistake was the result of said misrepresentations, concealment and fraudulent omissions of plaintiff's employes in charge of said work, to disclose to said architect the defects as aforesaid," and (3) that the terms of the contract had not been fulfilled and that to complete it "in accordance with the terms and conditions of the contract and specifications" would reasonably cost $980.

Tested by the principles of pleading applicable in other courts of record, the affidavit of defense did not meet the issues tendered by the statement of claim; and, tested by the principles of law applicable to such a contract as plaintiff pleaded, it did not plead facts that constituted a legal defense. And the attention of the trial judge was called to such situation by some proper action, the court might have given him time and expense a hearing evidence that covers over 300 typewritten pages, that under its holdings of law, was unnecessary to its ultimate decision, and which under such circumstances we should not be called on to review.

Defendant's pleading conceded it was a final

certificate, nevertheless his counsel argues here that it did not "amount to a final certificate." Even his propositions of law refer to it as such. But the evidence does not sustain his contention, for it clearly indicates that it was regarded as a final certificate by the architect and each of the parties to the contract and must be so regarded here. We do not think the evidence sustains the contention that it was not intended to be a final certificate, even if issued, as contended, on conditions that plaintiff would make certain repairs thereafter. Were such an issue raised by the pleadings yet the evidence thereon does not warrant the conclusion that the certificate was not a final one. Besides, the alleged conditions, so far as the evidence would warrant there were any, seemed to have been met in part by performance by the contractor and in part by the court in deducting in the judgment from the amount of such certificate the cost of performance.

There was nothing in the nature of waiver, as pleaded or proven, that would preclude plaintiff's right to rely on such certificate as a final one.

Nor were there any facts alleged or proven that constituted fraud or mistake that would impeach such certificate. Mere conclusions to that effect are stated in the affidavit of defense, but the facts therein alleged are insufficient to warrant them, and such conclusions were not sustained by the evidence. We find nothing in the record, nor does counsel for plaintiff in error point out anything therein that can be deemed either actual or constructive fraud, or mistake of facts on which the architect acted or with knowledge of which he was chargeable when he issued said certificate.

Nor, notwithstanding the architect's decision was final as to the construction and meaning of the drawings and specifications, and the certificate was made conclusive evidence of performance of the contract, does the record disclose that the building did not conform to the drawings and specifications.

As to the conclusiveness of the certificate on the question of performance, it is enough to say that it is in the same language that was construed in the case of Concord Apartment House Co. v. O'Brien, 228 Ill. 360, as an agreement that the final certificate should be so conclusive.

We think counsel for plaintiff in error state a proposition in accord with authorities on the subject when they say that "a final certificate is one which is issued after a job is done and which finally determines the rights of the parties as to money and outstanding disputes." Concurrence with that statement, in the absence of proof of fraud or mistake, requires affirmance of the judgment below. The court's holdings on the propositions of law were in accordance therewith and we find no error therein.

Nor can we say after a review of the evidence that, regardless of the conclusiveness of the final certificate, the court was not justified in denying the set-off on the theory that there was not a preponderance of evidence to show that plaintiff was responsible for the defects complained of. It did not show clearly a departure from the drawings and the specifications as to character of construction or material used. In fact there was much evidence to the contrary and that tended to show that the conditions complained of were not due to either defective workmanship or material.

Hence, neither under the law nor on the facts would

for, notwithstanding the artificial increase was
[illegible] to it the continuation was [illegible] of the drawings and
specifications, and the certificate was made immediately
[illegible] of the contract, when the [illegible]
discovers that the builders [illegible] to the drawings
and specifications.

As to the consequences of the certificate on
the question of performance, it is enough to say that it
is in the same language that was employed in the case of
Concord Electric Corp. v. D'Arlen, 328 Ill. 460, an
agreement that the final certificate should be so conclusive.

We have reviewed for plaintiff in error cases
exhibiting in nearly all conditions on the subject when
they say that a final certificate is one which is issued
after a job is done and under figures determines the rights
of the parties to begin and terminate disputes. Con-
sistency with this statement, in the absence of proof of
fraud or mistake, requires affirmance of the judgment below.
The court's ruling on the instructions of law were in
accordance therewith and we find no error therein.

The mere [illegible] a review of the evidence
[illegible] conflicts of the contentions of the first car-
[illegible], the court was justified in denying the set-
off on the theory that there was but a question of
[illegible] to which [illegible] was necessarily for the de-
[illegible] to [illegible]. It did not even clearly [illegible]
[illegible] conditions [illegible] to observance of
conditions in [illegible]. It [illegible] there was such viti-
[illegible] in the contract and work [illegible] by the con-
tractor as to [illegible] the [illegible] from the [illegible]
different conditions or were not due to other [illegible] mate-
rially to [illegible].

we feel justified in reversing the judgment. It will therefore be affirmed.

AFFIRMED.

438 - 21836

JOHNSON & JOHNSON, a corporation,
Appellee,

vs.

THE CREAMERY PACKAGE MFG. COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 263

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action to recover $1300 for goods alleged to have been sold and delivered by the plaintiff (appellee) to the defendant (appellant) consisting of 100,000 6 inch cotton filter circles at the price of $13 a thousand. The defense was that there was no sale or delivery and no order or purchase of the goods at such price. This appeal is from a judgment entered on a verdict for plaintiff for the amount sued for.

The main question of fact was whether defendant agreed to purchase said goods at such price, and that question depended on whether there was a meeting of minds as to the terms of the contract.

It appears that plaintiff's selling agent in Chicago, one Harris, pursuant to inquiry by defendant's purchasing agent, one Bernard, went to the latter's office in Chicago and gave him the price of 100,000 of filters according to sample shown, at $13 per thousand, as Harris testified, or at "thirteen per thousand", as Bernard testified; that afterwards Harris at his own office prepared an order for his house giving the purchase price at $13 per thousand and stating therein that the "original order"

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

THE CUDAHEY PACKING CO.
CUDAHEY, a corporation,
Appellant.

vs.

JOHNSON & JOHNSON, a
corporation,
Appellee.

MR. PRESIDING JUSTICE HARRIS
DELIVERED THE OPINION OF THE COURT.

This was an action to recover $1500 for goods alleged to have been sold and delivered by the plaintiff (appellee) to the defendant (appellant) consisting of 100,000 6 inch cotton filter circles at the price of $13 a thousand. The defense was that there was no sale or delivery and no order or purchase of the goods at such price. This appeal is from a judgment entered on a verdict for plaintiff for the amount sued for.

The main question of fact was whether defendant agreed to purchase said goods at such price, and that question depended on whether there was a meeting of minds as to the terms of the contract.

It appears that plaintiff's selling agent in Chicago, one Harris, pursuant to inquiry by defendant's purchasing agent, one Bernard, went to the latter's office in Chicago and gave him the price of 100,000 of filters according to sample shown, at $13 per thousand. Mr Harris testified, at at "thirteen per thousand", Mr Bernard testifies; that afterwards Harris at his own office prepared an order for his house stating the purchase price at $13 per thousand and stating therein that the "original order"

was attached, and he held the same until the receipt from defendant a few days later of an order prepared in its Chicago office designating the price as ".13 M" * * Your quotation of recent date - refer to Mr. Harris," and containing directions to ship to defendant's customer in Canada, and to "manifest at .15 M"; that Harris transmitted the order he prepared with that of defendant attached thereto, to the home office of plaintiff in New Jersey; that from the latter place the goods were sent forward to Canada, in two shipments of 12,000 and 87,000 filters respectively, the invoices of which with manifests were forwarded to defendant in Chicago.

Before defendant received the papers of the first shipment, Harris notified Bernard of a mistake in pricing the goods in the manifest at the price given to defendant. Later Bernard by letter confirmed the conversation regarding the corrections, saying "We are returning herewith the original papers and would ask you to correct the amounts thereon to $180." These figures corresponded to plaintiff's price, being at $13 per thousand. Whether or not the discrepancy in price was then noticed by Bernard, it was noticed later and became a subject of interview between him and Harris, and the latter and Bernard's superior. Orders thereafter to stop the second shipment came too late, and efforts towards an adjustment and to induce the customer to take the goods failed.

It was plaintiff's theory that there was a complete oral contract of sale at the time Harris submitted his prices as aforesaid, and that defendant's subsequent order was a mere confirmation thereof, and that the designation of the price therein at ".13 M" was a mere typographical

was attached, and to hold the case until the receipt from defendant a few days later of an order prepared in its Chicago office designating the price as ".12 M" * * Your quotation of recent date - refer to Mr. Harris," and containing directions to ship to defendant's customer in Canada, and to "manifest at .12 M"; that Harris transmitted the order be prepared with that of defendant attached thereto, to the home office of plaintiff in New Jersey; that from the latter place the goods were sent forward to Canada, in two shipments of 12,000 and 87,000 fifteen respectively, the invoices of which with manifests were forwarded to defendant in Chicago.

Before defendant received the papers of the first shipment, Harris rectified Bernard of a mistake in pricing the goods in the manifest at the price given to defendant. Later Bernard by letter confirmed the conversation regarding the corrections, saying "We are returning herewith the original papers and would ask you to correct the amounts thereon to $180." These figures corresponded to plaintiff's price, being at $15 per thousand. Whether or not the discrepancy in price was then noticed by Bernard, it was noticed later and became a subject of interview between him and Harris, and the latter and Bernard's superior. Orders thereafter to stop the second shipment came late, and efforts thereafter an adjustment and to induce the customer to take the goods failed.

It was plaintiff's theory that there was a complete meeting of minds at the time Harris executed his printed or typewritten, and that defendant's subsequent order was a mere confirmation thereof, and that the designation of the price therein at ".12 M" was a mere typographical

error, and that a letter from defendant to its customer, referring to it as such, was an admission of the fact.

It was defendant's theory that the submission of plaintiff's prices as aforesaid constituted an offer of which defendant's order was an acceptance, but that owing to the misunderstanding, as aforesaid, the parties' minds did not meet and hence there was no contract.

The correct theory is not for us to decide on this record. Whichever is correct, we think the court excluded certain evidence pertinent to each theory. On plaintiff's theory of an oral contract such evidence was material to determining defendant's understanding thereof; and on defendant's theory it was material to the question whether the order was as intended or in fact contained a mere typographical error.

To substantiate Bernard's understanding as well as to show that defendant's order was not a mistake as to the prices, defendant offered in evidence Bernard's memorandum thereof made,as claimed, at the time and in the immediate presence and sight of Harris; also to show what Bernard did with respect to the price that led up to the making of the order in the form it was sent to plaintiff; and also to introduce correspondence from defendant to its customer after the conversation and prior to sending plaintiff its order, which gave the quotation of prices as Bernard understood them.

All were rejected, and each in our opinion was competent. In fact under plaintiff's own theory of the contract the memorandum was a part of the res gestae (Rogers v. Krumrei,

143 Mich. 15; 24 Am. & Eng. Encyc. Law, p. 686.

Besides, the memorandum made under such circumstances and used in preparing the order as the offers and some evidence indicated, was relevant to the question of Bernard's understanding of the price and whether it was inserted in the order by mistake.

It is no answer to the competency of any of the proof so offered that the price as understood by defendant was ridiculous, that Bernard should have so known on seeing the sample, notwithstanding his claimed ignorance of the goods, and that Harris would have corrected the erroneous memorandum had he actually seen it. It is not a question of the credibility of the evidence offered but its materiality. While it is absurd that Harris should state the selling price of an article costing nearly $10 was 13 cents, it is no more absurd than that defendant should buy the article at $13 and sell it for 15 cents. The absurdity itself suggests a mistake somewhere, if not a misunderstanding from the beginning. But neither the effect of the mistake nor the weight of evidence pertaining to the transaction is the question for us, but simply the competency of the evidence rejected. We think the offers were erroneously refused.

The points as to the depositions can be properly raised before another trial on motion to suppress if the court improperly overruled the objections to them on this trial.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

143 Wash. 15; 24 Am. & Eng. Ency. Law, p. 650.

Next we, the statements made under such circumstances and used in accepting the order as the offers and some evidence is elicited, was relevant to the question of Bernard's understanding of the price and whether it was inserted in the order by mistake.

It is no answer to the competency of any of the proof so offered that the price as understood by defendant was ridiculous, that Bernard should have so known on seeing the sample, notwithstanding his claimed ignorance of the goods, and that Harris would have corrected the erroneous statement had he actually seen it. It is not a question of the credibility of the evidence offered but its materiality. While it is asserted that Harris should state the selling price of an article costing nearly $10 was 12 cents, if it is no more absurd than defendant should say the article at $12 and sell it for 15 cents. The absurdity itself indicates a mistake somewhere, if not a misunderstanding from the beginning. But neither the effect of the statements nor the weight of evidence pertaining to the transaction is the question for us, but simply the competency of the evidence rejected. We think the offers were erroneously rejected.

The points as to the impositions can be properly raised before another trial on motion to suppress if the court improperly overrules the objections to them on this trial.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

447 - 21845

GEORGE PYZIK,
Appellee,

vs.

MARIE FERKE and CITY OF CHICAGO,
On Appeal of MARIE FERKE,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

202 I.A. 265

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $3,750 for damages sustained by appellee from falling into a coal-hole in a sidewalk along the front of appellant's premises. It is urged that the evidence was insufficient to support a claim of liability against appellant, and that the jury was erroneously instructed.

Appellant's premises had about sixty feet of frontage on the street. Erected thereon were two buildings containing apartments or rooms occupied by appellant's tenants. In one of the apartments she and the family of her daughter lived. Whether she retained control of such apartment and allowed her daughter to live with her, or leased the same to her daughter and resided with the latter, does not appear. The evidence supports one inference as much as the other. All the other apartments appear to have been leased, one of them to her son.

Between the two buildings was a court or vacant space opposite which in the sidewalk was the coal-hole in question. From the court the tenants entered into a common passage way under the sidewalk to their respective coal cellars. There were eight of these cellars. Opening into each was a

GEORGE FIELD,

Appellee,

vs.

MARIA ZENOS and CARY W. ZENOS,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

2052 I.A. 2865

MR. HENDERSON DUFFIN DANIELS

DELIVERED THE OPINION OF THE COURT.

Error appeal is from a judgment for $2,750 for damages sustained by appellee from falling into a coal-hole in a sidewalk along the front of appellant's premises. It is urged that the evidence was insufficient to support a claim of liability against appellant, and that the jury was erroneously instructed.

Appellant's premises had about eight feet of frontage on the street. Fronted thereon were two building containing apartments or rooms occupied by appellant's tenants. In one of the apartments she and the family of her landlord lived. Whether she retained control of such apartment and allowed her daughter to live with her, or leased the room to her daughter and received rent from the latter, does not appear. The evidence supports the inference on which of the other. All the other apartments appear to have been leased, one of them to her son.

Between the two buildings and a court of vacant space opposite which in the sidewalk was the coal-hole in question. From the [illegible] court [illegible] into a common passage way under the stairway to their respective coal cellars.

There were eight of these cellars. Opening into each was a

door in said passage way and a coal-hole in the sidewalk above.

The several cellars appear to have been allotted to the different tenants, but by what plan or arrangement the record is again silent. The coal-hole in question opened into a cellar used by appellant's son. But one tenant testified that he saw appellant throw wood into that coal-hole and carry wood out of that cellar, and another witness that he saw her carry wood from that shed or cellar "to her house", which we infer to mean the apartment occupied by her and her daughter's family. Meager as this evidence is it tended to show joint use of the cellar either by two of appellant's tenants or herself and one of the tenants. Which way the jury found cannot be told.

With the different conclusions that may be drawn from such evidence as to whether appellant had divested herself of complete control and personal use of said premises to which the coal-hole seemed to be appurtenant, it is urged that the following given instruction was erroneous:

> "The court instructs the jury that where there is an opening through a public sidewalk into a cellar underneath and that such cellar is used in common by two or more persons who are tenants or occupants of the land or buildings adjacent thereto then it becomes the duty of the owner of such land or buildings to use reasonable care to keep and maintain the said opening and its cover in reasonably safe condition for persons traveling upon the highway."

Neither as applied to one state of facts nor as a general proposition does such instruction state a correct rule of law. "The general rule is," says the court in West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, "that the occupant of premises is responsible for injuries inflicted upon another by reason of the neglect or failure to keep

upon evidence of impact of the neglect or failure to keep
adequate drainage is reasonable for injuries inflicted
thereby on a person lawfully on the premises. Cf. Lewis
Grocery Company v. Lyon, 184 Ill. 234, 56 N.E. 361 (1900).

Neither is applied to one mode of trade and
is a general proposition does such instruction state a correct
rule of law. "The general rule is," says the court in Hunt
v. Pratt, 125 Ill. 245, 17 N.E. 729 (1888), "that the no-
tice to the owner of such land or buildings to use
reasonable care to keep and maintain the said opening
and its cover in reasonably safe condition for persons
traveling upon the highway."

> "The court instructs the jury that where there is an opening through a public sidewalk into a cellar under such cellar is used in common by the owner or occupants of the land or buildings adjoining thereto, then it becomes the duty of the owner of such land or buildings to use reasonable care to keep and maintain the said opening and its cover in reasonably safe condition for persons traveling upon the highway."

It is urged that the following given instruction was er-
roneous:

> "The court instructs the jury that a corporation has a right to construct and maintain in the streets of a city, coal holes, openings and doors in said pavements for the purpose of delivering coal therein, and a pedestrian walking upon the sidewalk in the vicinity of such openings, doors or coal holes, must exercise ordinary care to avoid injury therefrom, and if the jury believe from the evidence in this case that the plaintiff was injured by falling into a coal hole or opening in the sidewalk in front of the premises of the defendant, and that the plaintiff was not guilty of any negligence which contributed to cause the injury complained of, then the jury should find for the plaintiff."

The evidence appears to have been afforded
to the different theories, but by what plan or arrangement
the record is again silent. The coal-hole in question
opened into a cellar used by appellant's son. But one tenant
testified that he saw appellant throw wood into that coal-
hole and carry wood out of that cellar, and another witness
that he saw her carry wood from that shed or cellar "to
her house", which we infer to mean the apartment occupied
by her and her daughter's family. Whether on this evidence
is it tenable to deem joint use of the cellar either by two
of appellant's tenants or herself and one of the tenants.
Which way the jury found cannot be told.

With the different conclusions that may be
drawn from such evidence as to whether appellant had ar-
ranged herself of complete control and personal use of said
premises to which the coal-hole seemed to be appurtenant,
it is urged that the following given instruction was er-
roneous:

the premises in repair." (p. 218). The court then proceeds to state the exceptions to the rule under which the owner may be held liable. But even if there was evidence from which the jury could infer that appellant came within one of such exceptions, still the instruction is not predicated thereon. Nor does it rest on the theory of liability urged in the Cohn case, supra, that the owner retained control of a portion of the premises to which the defective part causing injury was appurtenant. The jury may have applied the instruction to an entirely different state of facts suggested by the evidence, namely, that both appellant's son and daughter were her tenants and that their families used the cellar in common. Those facts alone would not impose liability on her as owner. As the instruction, therefore, was calculated to bring about a verdict against appellant regardless of whether the evidence warranted a finding of liability on any other state of facts, the giving of it constituted prejudicial error for which the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

481 - 21879

IN THE MATTER OF THE PETITION OF MAXIMILIAN MEINHARDT, arrested at the suit of G. BERNHARD ANDERSON, Conservator of the estate of BRITA MATSON, Insane.

Appeal from County Court, Cook County.

202 I.A. 266

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the order of the County Court remanding appellant to the custody of the sheriff after hearing his petition as an insolvent debtor for release from imprisonment on an execution in an action in the Municipal Court of Chicago of which he claimed malice was not of the gist of the action. The burden of proving such contention rested on him. (Mahler et al. v. Sinsheimer, 20 Ill. App. 401.) To sustain it he merely offered the process, pleadings and judgment in the action resulting in his commitment, and the proceedings of the County Court in which Brita Matson, whose conservator obtained the judgment, was found insane.

Appellant's main point is that the statement of claim filed in the action in which the capias ad satisfaciendum issued does not disclose that malice was of the gist of the action. Even if that be conceded, nevertheless the evidence in the action may have shown that it was. As said in the Mahler case supra, "There may be cases where a mere inspection of the declaration is not sufficient to determine the character of the tort recovered for, as to being malicious or otherwise. In

IN THE MATTER OF THE PETITION
OF MARSHALL W. GOODRICH, arrested
at the suit of B. TURNBULL
ASHWORTH, Conservator of the
estate of Julia MORTON, Insane.

Appeal from County Court, Cook County.

2021A.256

MR. JUSTICE DIETZ MAKES NO STATEMENT THE OPINION OF THE COURT

This is an appeal from the order of the County Court remanding appellant to the custody of the sheriff after hearing his petition on an involvent debtor for release from imprisonment on an execution in an action in the Municipal Court of Chicago of which he claimed motion was not of the just of the action. The burden of proving such contention rested on him. (Wright et al. v. Greenleaf, 20 Ill. 392. 401.) To sustain it he merely offered the process, pleadings and judgment in the action resulting in his commitment, and the proceedings of the County Court in which Julia Morton, whose conservator obtained the judgment, was found insane.

Appellant's main point is that the statement of claim filed in the action in which the capias ad satisfaciendum issued does not disclose that notice was of the just of the action. Even if that be conceded, it established the evidence in the action may have shown that it was. It said in the Wright case supra, "There may be cases where a more inspection of the declaration is not sufficient to determine the character of the tort recovered for, as to being malicious or otherwise. In

such cases extrinsic evidence must necessarily be resorted to in order to determine that question." (405) There may have been such evidence to support the judgment on which the ca. sa. issued. If not, then it devolved on petitioner to so show to entitle him to a discharge. The judgment was not one by default. Had it been he might have relied on the pleadings alone. Otherwise, evidence being heard, it is immaterial to the question before us whether the statement of claim presented a case of malicious tort or not.

So far as appellant's brief discusses the merits of the tort case in the absence of the evidence adduced therein, and what constitutes malice, it raises points not presented by this record. The order will be affirmed.

AFFIRMED.

493 - 21891

MORRIS CHAIMOWITZ,
Appellant,

vs.

STANLEY FORMANEK,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

202 I.A. 267

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for the defendant in a replevin suit. The only point made is that the court's finding and judgment are against the weight of the evidence. On the contrary we think they accord with plaintiff's (appellant's) own evidence.

His claim to the property in question, a stock of shoes, was based upon an alleged sale to him by defendant through the agency of the latter's wife. The facts relied on show no sale was consummated. Plaintiff's own witnesses to the transaction testified that the consideration money was put in escrow and was not to be paid until the defendant "signed the bill of sale." He refused to sign it, repudiated the alleged arrangements and the authority of his wife to make them, never received the money, and never parted with possession of the goods. Under such circumstances there was no sale, even if there was a valid contract for one, about which the evidence is conflicting.

The contract, if any, was executory. Under it no right to possession of the property or delivery of

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plaintiff's (appellant's) own evidence.
His claim to the property in question, a stock
evidence. On the contrary we think they accord with
tendant in a replevin suit. The only point made is that the
court's finding and judgment are against the weight of the
This is an appeal from a judgment for the de-

DELIVERED THE OPINION OF THE COURT.

MR. PRESIDING JUSTICE BARNES

2021.3.267

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Appellee.
vs.
MARSHALL TUNNAVAN,
Appellant.
MORRIS GHALMOWITZ,

493 - 21821

the money passed or would pass unless defendant executed a bill of sale. Whether defendant was bound by the arrangements actually made or not, the contract testified to by plaintiff's witnesses contemplated further action under it relating to the transfer of title and delivery of the consideration money. Performance of these things was essential to a complete sale. (Scott v. Fowler, 227 Ill. 104.) If plaintiff had any right of action it was not one for possession of the goods.

AFFIRMED.

the money passed or would pass unless defendant executed a bill of sale. Whether defendant was bound by the extraordinary contract made or not, the contract testified to by plaintiff's witnesses contemplated further action under it relating to the transfer of title and delivery of the consideration money. Performance of these things was essential to a complete sale. (Scott v. Dorfan, 147 Ill. 104.) If plaintiff had any right of action it was not one for possession of the goods.

AFFIRMED.

429 - 21827

HARRY L. MOOAR,
Appellee,

vs.

WHEELING TILE CO., a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 278

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This appeal presents for review a judgment for $7, 643.42, for commissions alleged to be due plaintiff from defendant.

On November 15, 1910, the parties hereto entered into a contract whereby plaintiff was employed to sell tile to be manufactured by the defendant, within a designated territory, and as compensation for his services, he was to receive a commission on all orders solicited by him, and also on mail orders coming from his territory, whether solicited by him or not.

Plaintiff secured many orders for different quantities of the various kinds of tile manufactured by defendant, largely from contractors who were dealers in or users of tile. Said orders usually covered their floor tile requirements for a year from the date thereof. These orders were not in the form of contracts but were in the nature of general requisitions, showing the name of the customer, the gross amount of tile ordered, the purchase price, the terms of payment and shipment, and were signed by plaintiff as agent for defendant, and contained the signature or initials of the purchaser. From time to time

2021.1.278

BY: JUDICIAL ASSISTANT(S) FOR DIVISION OF THE COURT.

This cause coming on to be heard upon the motion of the plaintiff for judgment by default on account, and contained the order, the terms of payment and stipulations, and were signed by the Clerk of this Court, and the defendant, after having been duly served with process of this Court, appearing the terms of payment restrictions, appearing the terms of the orders were not in the form of contracts but were to the title redistributed for a year from the date thereof. These orders were made in cases of divorce. Said orders usually covered their time of life. Said orders usually covered their time of life. Said orders usually covered their time of life

the customers would order out specific quantities and kinds of tile under these general orders, as the requirements of their business demanded.

Upon the trial of the cause, the court found the issues for the plaintiff, and in assessing his damages, included commissions on the undelivered portions of the general orders hereinabove referred to. It is urged inter alia that the court erred therein, first, because there is not sufficient evidence in the record to support such finding; and second, because under the terms of contract of employment, plaintiff's commissions did not become due and payable until after shipments had been made.

The said contract of employment provided that plaintiff should receive as his compensation a certain percentage of the selling price of all "goods sold," and recited further, that "all settlements on the account of the second party (plaintiff) shall be made by the tenth of each month, covering accepted and shipped orders of the month previous." Both these provisions should be construed together, in order to arrive at the intent of the parties, as to when plaintiff's commissions were earned and should become due and payable.

It will be noted that the contract of employment provided that plaintiff's commission should be based upon the selling price of all goods sold. This implies that there must be an actual sale of the goods, and not a mere contract to sell, before the commission is earned. The term "goods sold" implies a transfer of title. (Garnhart v. Rentchler et al., 72 Ill. 535; People v. Law and Order Club, 203 Ill. 127.) Title does not pass until the goods ordered have been manufactured and appropriated for the purchaser. In the

case at bar, these general requisitions called for goods to be used by the purchaser during the ensuing year and were to be specifically ordered as requirements warranted. At the time the general requisitions were accepted by the defendant, the goods were not appropriated, in fact, in many instances, not even manufactured. Clearly, under such circumstances the tile ordered under these general requisitions cannot be said to have been sold, and hence no commissions were earned. By a subsequent paragraph the parties have fixed a definite time for the payment of commissions, i. e. on the tenth of each month, covering accepted and shipped orders of the month previous. There is no conflict between the clause fixing the rate of and basis upon which the commission is to be computed and the clause fixing the time when such commission shall be payable. By their contract, the parties expressly fixed the time when commissions were earned and when payable, and under such circumstances, there can be no question that the shipment of tile sold was made a condition precedent to the payment of commissions.

The evidence shows that the parties themselves so construed the contract. Plaintiff was in the employ of defendant for a period upwards of one year, and each month during that period he received from defendant a statement showing the commissions due him for tile shipped on his orders during the preceding month, which was accompanied by a check in payment of such commissions and a voucher which recited that plaintiff had received the amount named therein, in full payment thereof. During this entire period, plaintiff, although he was receiving commissions only upon accepted and shipped orders, never protested against this plan of payment. It is also

important to note that on February 24, 1912, after plaintiff had left the employ of the defendant, he sent defendant the following letter:

> "Will you kindly advise me, as soon as possible, what portion of each of the various contracts sent in by me, has been shipped. I want to know the present status of these contracts,"

further evidencing the fact that plaintiff so construed this clause, otherwise, why should he be concerned about shipments on his contracts?

A case very much in point is Greveling v. Wood, 95 Pa. St. 152, which was also an action for commissions on alleged sales of railroad iron. The contract of employment there provided for a 1½% commission on all sales of railroad iron and muck bar in a certain territory therein designated. The plaintiff was instrumental in bringing about the negotiations which subsequently culminated in a contract which called for an aggregate of 4500 tons of railroad iron, to be delivered at the rate of 200 tons per week. After 646 tons were delivered and paid for, the railroad company became financially embarrassed. The jury were instructed that if it appeared from the evidence that plaintiff had effected a sale of 4500 tons of iron, plaintiff was entitled to a commission thereon. The supreme court held this instruction to be erroneous because there was no evidence indicating that there had been an actual sale of 4500 tons of iron, but merely a contract to sell. On page 157 the court stated:

> "They were agents to sell under a special agreement. The sales contemplated in said agreement were actual sales in a commercial sense, not mere contracts to sell. A sale is 'a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration.' Story on Sales, Sect. 1. There was no sale here beyond the

six hundred and forty-six tons. There was a mere contract to sell. The iron was not even made. If the plaintiffs were entitled to commissions on the contract to sell, they had earned commissions on the entire forty-five hundred tons the moment the contract was entered into. No claim, however, was made for commissions on the undelivered iron until after the matter fell through by reason of the inability of the purchaser to pay. This portion of the claim was evidently an afterthought. The parties to the agreement regarded it as a contract for commissions on actual sales. On the 15th of December, 1877, more than a month after the last iron had been delivered, the plaintiffs sent to the defendant their bill for services to that time, in which they claimed one and a half per cent. on the six hundred and forty-six tons delivered, and made no claim for percentage on the residue of the forty-five hundred tons. The construction placed upon their agreement by the parties themselves at the time they were acting under it, was the proper one. There can be no recovery for commissions on the forty-five hundred tons beyond the amount actually sold and delivered."

The termination of the contract of employment in no respect abrogates the liability of the defendant to account to plaintiff for commissions due him on the general orders accepted prior to such abrogation and afterwards shipped, for plaintiff was entitled to receive his compensation on the tenth of each month for all tile shipped out during the preceding month, on orders taken by him or received through the mails from his territory, and accepted by defendant, prior to the cancellation of the contract of employment. Nor was defendant's liability to pay these commissions accelerated by the cancellation of the contract of employment.

In terminating the contract of employment, defendant was acting entirely within its legal rights. There is no claim by plaintiff that defendant breached its contract either by failure to make shipments or by furnishing tile not in compliance with orders. The court therefore erred in allowing plaintiff to recover commissions on the undelivered portions of said general orders.

In this view of the case, it becomes unnecessary to pass upon the other points raised by defendant, save to

six hundred and forty-six lines. There was a note
[illegible] to this item as well [illegible]. If
the plaintiff were relied to [illegible] on the
[illegible] by [illegible] [illegible] on the
entire forty-five hundred lines the moment the contract
was placed into. So doing, however, was made for
[illegible] on the undelivered item until after the
matter fell [illegible] by reason of the inability of the
manufacturer to say. This position of the claim was
[illegible] on alternative. The position we the agree-
ment regarded it as a contract for specialties on
actual sales. On the 12th of February, 19[illegible], more
than a month after the last item had been delivered,
the plaintiff sent to the defendant their bill for
services in that item, in which they claimed one and
a half per cent. on the six hundred and forty-six lines
delivered, and made no claim for percentage on the
remainder of the forty-five hundred lines. The com-
mission payable upon their agreement by the parties
themselves at the time they were acting under it, was
the proper one. There can be no recovery for commissions
on the forty-five hundred lines beyond the amount
actually paid and delivered."

[illegible] [illegible] [illegible] [

say that even upon plaintiff's theory of the case, the evidence does not sustain the judgment as to some of the items of commission on the undelivered balances of the general orders hereinabove referred to. These orders vary somewhat in their recitals. Some of them specify a definite price for the tile ordered therein, while in others the customer is to pay either "tile association prices" or a certain amount less. It is difficult to determine how the court could have ascertained plaintiff's damages, for there is no evidence in the record indicating what the tile association prices were at any time.

The alleged errors with respect to the rulings of the trial court on the admissibility of certain evidence offered on behalf of the defendant we need not discuss here, as they will probably not be repeated on another trial.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

487 - 21885

JOHN KOZIK et al.,
Appellees,

vs.

SLOVAK EVANGELICAL AUGSBURG DENOMINATION, PARISH OF STS. PETER & PAUL,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 280

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

John Kozik, and 32 others, as plaintiffs, brought suit and recovered judgment against the defendant, the Slovak Evangelical Augsburg Denomination, Parish of Sts. Peter and Paul, on the latter's note for $1,000, from which said judgment this appeal is prosecuted. The brief of counsel for appellant contains numerous points relied upon for a reversal of this judgment, each of which is alleged to be based upon facts shown by the record as abstracted by appellant. Appellee has filed an additional abstract, from which, when compared with the record, it appears that appellant, in abstracting the record, did not permit itself to be hampered by the facts in the case.

The aforesaid plaintiffs constitute the remaining loyal members of an unincorporated society known as Spolek Dr. Milos Stefanovic No. 83, which was one of a large number of subordinate spoleks or lodges comprising a fraternal order known as the Slovak Evangelical Union of America, incorporated under the laws of and located in the state of Pennsylvania. These subordinate lodges were organized under and governed by the constitution and by-laws of the parent organization, whose principal object was to pay sick and

497 - 31888

JOHN KOSIK et al.,
Appellees,

vs.

ANCIENT ORDER
MUNICIPAL COURT
OF CHICAGO.

MOJAVE EVANGELICAL AMUSEMENT
DEMONSTRATION, Parties to the
Petition & Panel,
Appellants.

2052 I.A. 28

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Kosik, and 21 others, as plaintiffs, brought suit and recovered judgment against the defendant, the Mojave Evangelical Amusement Demonstration, Parties of the Peter and Paul, on the Justice's note for $1,000, from which said judgment this appeal is prosecuted. The brief of counsel for appellant contains numerous points relied upon for a reversal of this judgment, each of which is alleged to be under oath known by the record as abstracted by appellant. Appellee has filed an additional abstract, from which, when compared with the record, it appears that appellant, in abstracting the record, did not permit itself to be hampered by the facts in the case.

The aforesaid plaintiffs constitute the remaining lyral members of an unincorporated society known as Hyalex Dr. Miles Auditorium No. 82, which was one of a large number of subordinate lodges or lodges comprising a fraternal order known as the Ancient Ancestral Union of America, incorporated under the laws of and located in the state of Pennsylvania. These subordinate lodges were organized under and governed by the constitution and by-laws of the parent organization, whose principal office was in Pittsburgh, Pennsylvania.

and death benefits.

At the annual convention of the parent organization held during the fall of 1912, a change was made in the method of assessing its members, from a uniform assessment plan for all members, to one under which the members were assessed according to their respective ages. Said change was to have become effective January 1, 1913. This new plan of assessment met with the disapproval of a majority of the members of Spolek No. 83, as a result of which, at a meeting held early in January 1913, upwards of 100 of the 163 members of said spolek withdrew from the association and formed a rival organization. At the meeting at which this action was taken there were present 15 or 16 members of the organization, who manifested their determination to remain loyal to the parent organization. These loyal members were compelled to leave the meeting, after which the insurgent members proceeded to dispose of all the property belonging to Spolek No. 83. The money in its treasury, amounting to upwards of $500, was donated to one John Ducaj, the then treasurer, for his services, while the $1,000 note in question was donated to the appellant church, the maker thereof. A few days later, the loyal adherents of the said Spolek No. 83 called a meeting of all loyal members thereof, at which they formally protested against the action of the secessionists who had dissolved the said spolek and disposed of its property, and subsequently demanded a return of all of its property.

The constitution and by-laws of the parent organization contained the following provisions:

> "Section 131. No assembly can be dissolved or expelled as long as it has seven members in good standing.
>
> "Section 163. At a regular meeting of an assembly seven members in good standing shall constitute a quorum to transact all official matters legally."

and death benefits.

At the annual convention of the Parent organization held during the fall of 1912, a change was made in the method of assessing its members, from a uniform assessment plan for all members, to one under which the members were assessed according to their respective ages. Said change was to have become effective January 1, 1913. This new plan of assessment met with the disapproval of a majority of the members of Lodge No. 83, as a result of which, at a meeting held early in January 1913, upwards of 100 of the 103 members of said Lodge withdrew from the association and formed a rival organization. At the meeting at which this action was taken there were present 12 or 15 members of the organization, who manifested their determination to remain loyal to the parent organization. These loyal members were compelled to leave the meeting, after which the insurgent members proceeded to dispose of all the property belonging to Lodge No. 83. The money in its treasury, amounting to upwards of $800, was demanded by one John Meek, this then treasurer, for his services while the $1,000 note in question was loaned to the aforesaid organization, the note itself. A few days later, the loyal members of the said Lodge No. 83 called a meeting of all loyal members thereof, at which they formally protested against the action of the secessionists who had dissolved the said Lodge and disposed of its property, and subsequently demanded a return of all of its property.

The constitution and by-laws of the parent organization contained the following provisions:

"Section 131. No property can be disposed of or disposed as long as it has seven members in good standing.

"Section 149. At a regular meeting of no assembly seven members in good standing shall consider a motion to transact all official matters

It is contended by appellant that the action of the majority members of the said spolek, in disposing of all its property, was legal and binding upon the loyalists who left the aforesaid meeting, and that the court erred in entering judgment against defendant on the note in question, to whom it had been donated by said majority of secessionists. With this contention we cannot agree. It clearly appears from the record in this case, that at the meeting at which this action was taken, the insurgent members had in contemplation the dissolution of said spolek and the establishment of a rival organization, which was effected as soon as the property was disposed of, notwithstanding there were present more than seven members in good standing who were loyal to the parent organization and had asserted their determination to so continue.

It has been frequently held by our courts, that so long as the minimum number necessary to constitute the existing local organization remains in the lodge, even though in the minority, they alone are entitled to the use and enjoyment of the property of the organization, and the members of the lodge who secede therefrom lose their rights to the property and funds of the lodge, although they constitute a majority of the members. (Freundschaft Lodge v. Alchenburger, 235 Ill. 438; McFadden v. Murphy, 149 Mass. 341.) Nor had a majority of the members of said subordinate lodge the power or authority to dissolve or destroy the lodge, so long as seven or more members remained loyal and desired to continue the organization. (Freundschaft Lodge v. Alchenburger, supra.) In the case at bar, the majority members had not the right to donate to the defendant the note in question, and the court therefore properly entered judgment thereon.

It is contended by appellant that the action of the majority members of the said Lodge, in disposing of all its property, was legal and binding upon the loyalists who left the Grenfell meeting, and that the court erred in entering judgment against defendant on the note in question, to which it had also obtained by said majority of possessionable plea that consideration be cancelled. It clearly appears from the record in this case, that at the meeting at which said action was taken, said impugned members had in contemplation the alienation of said lodge and the substitution of a rival organization, which was effected on same as the property was disposed of, notwithstanding there were present more than seven members in good standing who were loyal to the parent organization and had asserted their determination to be continue.

It has been frequently held by our courts, that a local or the minimum number necessary to constitute the existing local organization remains in the lodge, even though in the minority, they alone are entitled to the use and enjoyment of the property of the organization, and the members of the lodge who wrestles thereform lose their rights to the property and funds of the lodge, although they constitute a majority of the members. (Krautheimer& Lodge v. Richmond, 108 Ill. 488; Reynolds v. Murphy, 149 Mass. 311.) For but a majority of the remnant of said subordinate lodge the power or authority to dissolve it destroy the lodge, as long as there be more members remained loyal and desired to sustain the organization. (Krautheimer& Lodge v. Lindenberger, supra.) In the case at bar, the majority members had not the right to donate to the defendant the note in question, and its every therefore property entered judgment thereon.

Finding no reversible error, the judgment will be affirmed, and the cost of the additional abstract will be taxed against the appellant.

AFFIRMED.

Failing to redeem either, the judgment will be affirmed, and the cost of the additional contract will be taxed against the appellant.

AFFIRMED.

2253

528 - 21926

MARIA P. BARNES,
Appellant,

vs.

MARY C. BARNES et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 289

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below), filed a bill for an accounting against appellee (defendant below), who was the administratrix of the estate of Erastus A. Barnes, her deceased husband, brother of the complainant, for certain moneys and securities claimed to have been intrusted by complainant to him for investment and safekeeping. After the issues were formed, the cause was referred to a master in chancery for hearing, with directions to state his conclusions of law and fact. At the close of complainant's testimony before the master, defendant moved the court to dismiss complainant's bill for want of equity, which motion was also referred to the master. In his report based solely on the complainant's testimony, the master recommended to the court that defendant be required to account to the complainant in accordance with the prayer of her bill; pursuant to which the court overruled defendant's motion to dismiss the bill. By stipulation of the parties, all further proceedings were had before the court, at the conclusion of which the court dismissed the complainant's bill for want of equity. This appeal brings up for review the final order of dismissal.

2323

Appellees.

vs.

Appellant.

2323 I/C 2323

of dismissal.

equity. This second finding up for review the final order

which the court dismissed the complainant's bill for want of

proceedings were had before the court, at the conclusion of

dismiss the bill. By stipulations of the parties, all further

pleasure to which the court overruled defendant's motion to

complainant is convinced with the answer of her bill;

the words that may appear to be required to account to the

on the complainant's testimony. The master recommended to

dismiss complainant's bill for want of equity, which motion

was also referred to the master. To his report dated March

testimony before the master. Defendant moved the court to

ciphers of law and fact. At the close of complainant's

ry for hearing, with directions to state its conclu-

the issues were framed. The answer was referred to a master

complainant to his for investment and safekeeping. After

bonds and securities claimed to have been invested by

deceased husband, trustee of the complainant, for certain

the administratrix of the estate of Maurice A. Bowen, de-

ed according against appellee (defendant below), who was

BY. IN THE SUPREME COURT SITTING FOR THE DISTRICT OF THE SAME.

Appellant (complainant below), filed a bill for

Bank E. Bowen et al.,

No.

COURT CODE.

APPEAL FROM

DISTRICT CODE.

From an examination of the pleadings and the character and extent of the testimony heard before the court, it appears that the cause proceeded to a full hearing both on the preliminary question involving complainant's right to an accounting and on the accounting between the parties as well. Under well-settled principles of chancery practice, in certain cases the court should in the first instance, hear only such evidence as is necessary to determine whether or not an accounting should be had. But there are well-recognized exceptions to that rule, as stated in Henderson's Chancery Practice, sec. 293: "Where items are numerous, the testimony questionable, the account complicated, the superior advantage of a general reference, with directions to the master to state specially such matters as either party may require, or which he may deem necessary, will readily be perceived." The record discloses that this is a case of that character, and therefore the matter was properly referred to the master in the first instance, with directions to report his conclusions both of law and fact which, if he found there should be an accounting, required him to state the account.

The hearing evidently did not proceed before the court on the theory of a preliminary hearing, for the court heard testimony on items of account. Had the case proceeded before the master, so that specific objections and exceptions taken to the master's report might have been presented for review, we should not now be called upon to examine the voluminous record before us, covering some 10,000 pages, and thereby assume a burden that should have been imposed upon the matter.

In Penniman v. Pinke, 175 Ill. App. 284, the court in passing upon a like situation, held, p. 285:

> "In order to ascertain whether this decree is right, we must state practically a book account between the owner and the builder, and pass upon a mass of details and items. In our opinion, this detail work should not have been performed by the chancellor, and a review of the mass of evidence therefore cannot be cast upon this court in this way. The court should have sent the case to a master, with directions to take and report the evidence, and to state and report an account between the parties and then upon objection and exception, particular items would be open to investigation, and we would not be required to examine the face of the whole account."

To the same effect are: Patten v. Patten, 75 Ill. 446; French v. Gibbs, 105 Ill. 523; Daly v. St. Patrick's Catholic Church, 97 Ill. 19. Nor can this be done by stipulation of the parties or otherwise. Moss v. McCall, 75 Ill. 190 and cases there cited.

But appellee argues that complainant, in seeking to avail herself of certain alleged forgeries, did not come into equity with clean hands, and hence the court properly dismissed the bill for want of equity on that ground alone.

We have no way of determining upon what particular ground the bill was dismissed; but, assuming that the court was justified in finding that proof to establish certain items consisted, as alleged, of forged documents, still appellee's point is not well taken.

Where a cause of action has its origin in iniquity, a court of chancery will not lend its aid to a complaining party, because "He who comes into equity must come with clean hands." But where the iniquity does not go to the right of action itself but affects only the proof of certain items incidentally connected therewith, the rule cannot be extended to preclude the complaining party from obtaining the relief sought as to other items which the evidence clearly

"In order to counteract unfair undue
to claim, as most state participants do, that economic
freedom [illegible] is a civil right. In any case, when
a court of equity will not lend its aid to a complainant
party, because [illegible] into equity [illegible] with
clean hands." [illegible] the Act might even not go to the
right of action strictly but effects only the court of equity
[illegible] remedies [illegible], the suit cannot be
entertained if precisely such type of objection
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

shows to be untainted with such iniquity. Goodwin v. Hunt, 3 Yerg. (Tenn.) 124; Shaver v. Heller, 48 C. C. A. (U. S.) 48, 108 Fed. 821; Mossler v. Jacobs, 66 Ill. App. 571; Anisfield v. Grossman, 98 Ill. App. 180; Cohn v. Pitzele, 117 Ill. App. 342, affirmed, 217 Ill. 30; City of Chicago v. Stock Yards Co., 164 Ill. 224.

In this view of the case, it becomes necessary to reverse the decree and remand the cause, with directions to re-refer the same to a master to resume the hearing where the court erroneously took it up.

If, in the interest of economy it is desired to withdraw the record filed in this court to use the evidence therein contained in the hearing to be had before the master, the parties may do so.

Inasmuch as the hearing proceeded before the chancellor by stipulation of the parties, the costs of this appeal will be taxed, one-half to the complainant and one-half to the defendant, as administratrix etc.; the latter to be paid in due course of administration.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

with the views hereinabove expressed.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Costs to be paid by the defendant in error.

Reversed and remanded.

Mr. Justice Brandeis, dissenting.

The question presented before the Interstate Commerce Commission by application of the carrier, the basis of this appeal, is clear, non-trivial in the complainant and unprecedented in the relations, in substantially all the respects to which the latter is entitled, to relief in the premises. The carrier is entitled to have the Commission consider the question presented by its application. Whether the Commission ought to do so.

Generally, it is the interest of economy if it desires to eliminate the reason given in this court to use the evidence already taken in the hearing before the Commission. But, in the interest of economy it is desired to short-circuit exceptionally lengthy litigation, the short cut the carrier takes may be a wasteful one. Whether the petition should be granted, with directions to receive the further evidence, rests with the Commission. In this view of the case, it becomes necessary to

v. Texas Pacific ..., 234 Ill. 164.

Ill Ill. App. Ct. 417, 90; Texas & Pacific Railway v. Interstate Commerce Com., 162 U. S. 197; Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota, 134 U. S. 418, 458; Smyth v. Ames, 169 U. S. 466, 546; Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155, 161; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 399; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494; Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88, 93; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91; Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470

528 - 21926

MARIA P. BARNES,
Appellant,

vs.

MARY C. BARNES et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Filed

202 I.A. 289

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below), filed a bill for an accounting against appellee (defendant below), who was the administratrix of the estate of Erastus A. Barnes, her deceased husband, brother of the complainant, for certain moneys and securities claimed to have been intrusted by complainant to him for investment and safekeeping. After the issues were formed, the cause was referred to a master in chancery for hearing, with directions to state his conclusions of law and fact. At the close of complainant's testimony before the master, defendant moved the court to dismiss complainant's bill for want of equity, which motion was also referred to the master. In his report based solely on the complainant's testimony, the master recommended to the court that defendant be required to account to the complainant in accordance with the prayer of her bill; pursuant to which the court overruled defendant's motion to dismiss the bill. By stipulation of the parties, all further proceedings were had before the court, at the conclusion of which the court dismissed the complainant's bill for want of equity. This appeal brings up for review the final order of dismissal.

MARIA Z. JACOBS,
Appellant,

vs.

MARY C. JACOBS et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCCONNELL DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below), filed a bill for an accounting against appellee (defendant below), who was the administratrix of the estate of Frederic A. Jacobs, her deceased husband, brother of the complainant, for certain moneys and securities claimed to have been intrusted by complainant to him for investment and safekeeping. After the issues were formed, the cause was referred to a master in chancery for hearing, with directions to state his conclusions of law and fact. At the close of complainant's testimony before the master, defendant moved the court to dismiss complainant's bill for want of equity, which motion was also referred to the master. In his report based solely on the complainant's testimony, the master recommended to the court that defendant be required to account to the complainant in accordance with the prayer of her bill; pursuant to which the court overruled defendant's motion to dismiss the bill. My stipulation of the parties, all further proceedings were had before the court, at the conclusion of which the court dismissed the complainant's bill for want of equity. This appeal prays us for review the final order of dismissal.

From an examination of the pleadings and the character and extent of the testimony heard before the court, it appears that the cause proceeded to a full hearing both on the preliminary question involving complainant's right to an accounting and on the accounting between the parties as well. Under well-settled principles of chancery practice, in certain cases the court should in the first instance, hear only such evidence as is necessary to determine whether or not an accounting should be had. But there are well recognized exceptions to that rule, as stated in Henderson's Chancery Practice, sec. 293: "Where items are numerous, the testimony questionable, the account complicated, the superior advantage of a general reference, with directions to the master to state specially such matters as either party may require, or which he may deem necessary, will readily be perceived." The record discloses that this is a case of that character, and therefore the matter was properly referred to the master in the first instance, with directions to report his conclusions both of law and fact. The hearing evidently did not proceed before the court on the theory of a preliminary hearing; the testimony heard related to all items of account, but from the evidence as heard, we are of the opinion that the court erred in holding in effect that there was no liability to account. Having reached that conclusion, we are clearly of the opinion that the accounting itself should have been taken before the master, so that specific objections and exceptions taken to the master's report might be presented for review. Had the cause so proceeded, we should not now be called upon to examine the voluminous record before us and thereby assume a burden that should have been imposed

upon the master.

In Penniman v. Pinke, 175 Ill. App. 284, the court in passing upon a like situation, held, p. 285:

> "In order to ascertain whether this decree is right, we must state practically a book account between the owner and the builder, and pass upon a mass of details and items. In our opinion, this detail work should not have been performed by the chancellor, and a review of the mass of evidence therefore cannot be cast upon this court in this way. The court should have sent the case to a master, with directions to take and report the evidence, and to state and report an account between the parties and then upon objection and exception, particular items would be open to investigation, and we would not be required to examine the face of the whole account."

To the same effect are: Patten v. Patten, 75 Ill. 446; French v. Gibbs, 105 Ill. 523; Daly v. St. Patrick's Catholic Church, 97 Ill. 19. Nor can this be done by stipulation of the parties or otherwise. Moss v. McCall, 75 Ill. 190 and cases there cited.

The testimony taken and the exhibits received in evidence cover upwards of 10,000 typewritten pages in the record. It appears therefrom that there was a multitude of transactions of a fiduciary nature between the complainant and her deceased brother, extending over a period upwards of 35 years, during which she intrusted him with practically her entire earnings, savings and income, aggregating approximately $50,000; that no settlement thereof was ever had; that the deceased invested complainant's money from time to time, retaining possession of the securities so purchased; that the securities and other personal effects of both were kept in a safety deposit box rented by them jointly, to which each had access; that when complainant's brother died, there were in their joint possession securities and assets of an

> "It cannot be questioned whether this country
> is ready for peace and its full privileges, and open arms
> welcome her home and like brothers, and pass upon
> a footing of equality and liberty. We are opening,
> this day, a new account with time. We have been restored
> by the dispensation, and a view of this event of
> infinite importance cannot be cast upon this short
> day only. The people should look upon the close
> of a century, full of afflictions to bring and reports
> of peace and prosperity. And to celebrate the day and report
> the progress, will be entering on the duty and
> privilege of every citizen. And as every one should
> feel a personal interest in the day, so every one
> should endeavor, by his conduct, to render it
> propitious to the future, and to be enabled to
> look back upon it with pleasure."

To the same effect see: Dalton v. Fulton, 21 Ill. 544; Freeman v. Dalton, 18 Ill. 498; Ogle v. Lee, Peck's Cumberland Chancery, 67 Tenn. 14. For dum tibi dum ne desis ay existence of the Constitution a reluctance. Cone v. Dunn, 13 Ill. 148 and under these cited.

The testimony fixes and the exhibits received in evidence serve upwards of 10,000 typewritten pages in the record. Illegible Confederate Note. Under all a multiplicity of transmissions of a fiduciary nature between the appellants and Ingersoll Brothers, amounting over a period upwards of 20 years, during which was introduced into evidence numerous exhibits, analysis and letters, accountings, accountants, etc. Each of the settlements thereof was made; that the aforesaid investments amounted in the aggregate to $10,000; that the settlement of this account; that the aforesaid amounts of the investments in question; that the counsellor and other personal effects of said estate [illegible] and that the aforesaid [illegible] is a [illegible] and [illegible] and [illegible] and

aggregate value approximating $66,000; that many of these securities bore no evidence from which their ownership could be determined. The evidence further shows that during the same period of time the deceased had accumulated a sum of about $50,000, the greater part of which he lost through speculation.

For the purpose of establishing the relationship existing between the complainant and her brother, and in support of her claim to certain of the securities in question, complainant introduced in evidence letters alleged to have been written to her by the deceased during his lifetime. Defendant questioned the authenticity of a number of these letters, and many pages of the record are taken up with the testimony of handwriting experts with respect thereto. In our opinion, however, there is ample other evidence in the record, consisting of letters and the testimony of a great many witnesses, which, if true, clearly established complainant's right to an accounting. On this state of the record, the conclusion is irresistible that the court erred in dismissing complainant's bill for want of equity.

In this view of the case, it becomes necessary to reverse the decree and remand the cause, with directions to re-refer the same to a master to take and report the testimony, and to take and state an account. The costs of this appeal are to be taxed, one-half to the complainant and one-half to the defendant.

If, in the interest of economy it is desired to withdraw the record filed in this court to use the evidence therein contained in the hearing to be had before the master, the parties may do so.

The decree of the Circuit court will be reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS

432 - 21830

ZULU MANUFACTURING COMPANY, a corporation,
Appellant,

vs.

MAX G. J. HOFFMANN and PAUL J. HUXMANN,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

202 I.A. 292

STATEMENT OF FACTS. In this proceeding, appellant filed a bill in equity seeking to restrain appellees from enforcing the payment of a judgment in favor of Max G. J. Hoffmann for $382.80, which sum the latter claimed to be due him from appellant for manufacturing certain parts of match vending machines. The judgment was afterwards affirmed by this court upon writ of error, (Hoffmann v. Zulu Mfr. Co., 185 Ill. App. 185). Appellant in said bill, offered to pay the judgment, upon the delivery of the machines, but alleged that Hoffmann had transferred same to the Aamax Co., a corporation organized by him and later adjudged bankrupt; that the receiver appointed in such bankruptcy proceedings had possession of the machines and that Hoffmann had assigned the judgment to Paul J. Huxmann, his attorney. The receiver was not made a party. Separate answers were filed by Hoffmann and Huxmann wherein the material allegations of the bill were denied. Hoffmann in his answer admitted that he had the machines, that appellant was entitled to possession of same, but refused to accept them, and denied that he had transferred them to said corporation, or that its receiver had them in his possession. A temporary injunction issued, enjoining Hoffmann and Huxmann, appellees,

IN A MANDAMUS PROCEEDING.
A corporation,
Appellant,
vs.
[illegible] COUNTY,
[illegible] COURT,
Respondent.

MAY 9, 1. MANDAMUS and [illegible].
1. JURISDICTION,
Appellate.

2021A, 292

STATEMENT OF FACTS. In this proceeding, appellant filed a writ to compel [illegible] to restrain appellees from enforcing [illegible] of a judgment in favor of Sec 2, Wallowa Co. [illegible] Ann. Codes and Stats. 1920, which was the latter statute to be due him from appellant for [illegible] certain parts of [illegible] vending machines. The judgment was [illegible] by this court upon writ of error, (Wallowa v. Bain Mfg. Co., 108 III. App. 128). Appellant in said bill, offered to pay the judgment, if at the delivery of the machines, but alleged that Wallowa had transferred same to the Bamax Co., a corporation organized by him and later adjudged bankrupt; that the property acquired in such bankruptcy proceedings had passed to the machines and that Wallowa had assigned the judgment to Neal J. Bateman, his attorney, who receives now not only a party. Separate demurrers were filed by Wallowa and Bateman whereby the material allegations of the bill were denied. Wallowa in his answer admitted that he had the machines, that appellant was entitled to possession of them, but refused to accept them, and denied that he had transferred them to said Bamax Co., but that the machines had been delivered to said corporation, at that time member but then in its possession. A [illegible] in-

from enforcing payment of the judgment, until the further order of the court. Subsequently ~~appellant~~ complainant filed three successive amendments to said bill, demurrers to all of which were sustained, and the case referred to a master. The evidence taken before the master and his findings contemplated an amendment to said bill to the effect that elements of fraud and perjury entered into the procuring of said judgment. The court overruled exceptions filed by appellant to the master's report, and entered a decree dismissing said bill for want of equity. Thereafter ~~appellant~~ complainant was not permitted by the court to amend said bill as contemplated before the master, but the court modified said decree so as to continue in force the temporary injunction until the final determination of the cause in this court. This appeal is brought to review the correctness of said decree.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Appellant's bill was filed upon the theory that Hoffmann, who recovered a judgment in the Municipal Court for work done on appellant's machines, had sold the machines and was therefore unable to deliver them to appellant.

During the progress of the hearing before the master, appellant's counsel evidently abandoned such theory and claimed to have in his possession newly discovered evidence to the effect that the judgment in the Municipal Court had been procured through perjured testimony and it is solely upon the latter ground that appellant relies upon a reversal here. The evidence thereafter given before the master and his findings were in contemplation of an amendment containing such allegations. The court refused to permit such amendment to the bill and did not abuse its discretion in so doing. But if such amendment had been allowed, the

evidence would not sustain the charge of perjury as it does not appear from any competent evidence (a) what was really tried in the Municipal Court, and (b) that the matters testified to, and alleged to be false, were necessarily untrue.

We are of opinion that the court did not err in overruling the exceptions to the master's report, and that appellant was not prejudiced by the refusal of the court to permit the amendment offered. The decree of the Superior Court is therefore affirmed.

AFFIRMED.

444 - 21842

CENTRAL TRUST COMPANY OF ILLINOIS,
Appellee,

vs.

ANNA N. KENDALL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 294

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Suit was commenced by appellee, (hereinafter referred to as the "Trust Co."), to recover as a bona fide holder, upon two certain promissory notes for $400 and $600, respectively, purporting to have been executed by appellant, (hereinafter known as defendant), endorsed by her in blank, and likewise endorsed by the Robinson Springs Co., "per H. H. Thomas, Treas.". Defendant, in her affidavit of merits, alleged, in substance, that said notes were given by her without consideration, of which fact plaintiff had knowledge; that H. H. Thomas, to whom defendant delivered said notes, assigned same to plaintiff in violation of an agreement made by him with defendant. Defendant, by an additional affidavit of merits, denied the execution of said notes, and averred that the same were not her obligation. At the close of all the evidence the court directed a verdict for the plaintiff, and entered judgment thereon for $1037.94. This appeal is prosecuted to review the correctness of that judgment.

It appears from the evidence that the Trust Co. purchased from the Colonial Trust and Savings Bank a large number of notes, including two notes signed by defendant for

444 - 47645

vs.

CE CHICAGO.

MUNICIPAL COURT

APPEAL FROM

Appellee,

Central Trust Company of
ILLINOIS,

Appellant.

ANNA F. DONNELLY,

[illegible]. JUSTICES NOT DULY ASSIGNED TO THE DUTIES OF THE COURT.

built was commenced by plaintiff, (hereinafter referred to as the "Trust Co."), to recover on a bond file holder, upon two certain promissory notes for $400 and $600, respectively, each dated to have been executed by defendant, (hereinafter known as defendant), endorsed by her in blank, and likewise endorsed by the Robinson Lumber Co., for H. H. Thomas, Trees.". Defendant, in her affidavit of merits, alleged, in substance, that said notes were given by her without consideration, of which fact plaintiff had knowledge; that H. H. Thomas, to whom defendant delivered said notes, assigned same to plaintiff in violation of an agreement made by him with defendant. Defendant, by an additional affidavit of merits, denied the execution of said notes, and averred that the same were not her obligation. At the close of all the evidence the court directed a verdict for the plaintiff, and entered judgment thereon for $1027.94. This appeal is presented to review the correctness of that judgment.

It appears from the evidence that the Trust Co. purchased from the Colonial Trust and Savings Bank a large number of notes, including two notes signed by defendant for

$800 and $600, respectively; that H. H. Thomas, Treasurer of the Robinson Springs Co., brought the notes in suit to the Trust Co. and took up the two prior notes of defendant by paying $200 on each of said notes, and depositing with the Trust Co. the notes in question. The Trust Co.'s evidence tended to show that said notes were executed and endorsed by defendant; that it had no knowledge of any defense that defendant claimed to have as to said notes; and that it was a holder in due course. Defendant testified that she did not know whether or not she signed said notes, but if she did, the words "after maturity" appearing on the face of the $400 note at the time of the trial, did not appear thereon when she signed it. Defendant's real contention is, that (a) the notes were given without consideration, (b) that they were negotiated in breach of faith by H. H. Thomas and without authority, (c) that the Trust Co. had knowledge of these facts and was not therefore a holder in due course. There is no evidence to show any fraud in the execution of the notes.

Both notes were signed by defendant, payable to her order, and by her endorsed in blank; likewise on each note appears a second endorsement of the Robinson Springs Co.

The pleadings tendered no issue as to the assignments of the instruments, for the affidavit of merits did not deny the execution of any of them, as is required by section 52 of the Practice Act before a party can question an assignment. The affidavits went merely to denial of defendant's execution of the notes, to their want of consideration and to fraud. There was no evidence offered or received that tended to support any one of these defenses.

It is urged that defendant's testimony to the

effect that the words "after maturity" following the interest clause, were not on the note when she signed it, tended to support such affidavit. Without them she would be liable for interest from the date of the note instead of from its maturity. Even though there was such an alteration the effect of it was to reduce the period of time for interest. In our opinion it did not vitiate the note, and did not affect her legal obligation to pay the note and interest for the lesser time. It constituted no defense and was properly disregarded.

It is urged that the words "sixty days" on one of the notes appear to be an alteration. There was no evidence that the note in that respect was not in the same condition when signed. If it was an alteration after execution it devolved on defendant to prove it.

Defendant offered to prove by secondary evidence the contents of a resolution of the Robinson Springs Co. which resolution, in due course of business, was delivered by the Colonial Trust and Savings Bank to the Trust Co. with defendant's original notes. Such resolution, it was alleged among other things, authorized the Robinson Springs Co. to discount notes, and its president, then Richard L. Bradley, and its secretary, H. H. Thomas, to endorse same. Even if such resolution became material, which we do not hold, it contained no notice to the Trust Co. of any infirmity or defect in the title of the person or company negotiating said notes. The court also properly excluded evidence offered by defendant as to her negotiations with H. H. Thomas, or the Robinson Springs Co., at the time she delivered said notes, as there was no evidence of any knowledge on the part of the Trust Co. of such negotiations at the time it received either the original notes or the renewal notes sued upon. Evidence,

effect that the words "after maturity" following the interest clause, were not on the note when she signed it, tended to support such affidavit. Without them she would be liable for interest from the date of the note instead of from its maturity. Even though there was such an alteration the effect of it was to reduce the period of time for interest. In our opinion it did not vitiate the note, and did not affect her legal obligation to pay the note and interest for the longer time. It constituted no defense and was properly disregarded.

It is urged that the words "sixty days" on one of the notes appear to be an alteration. There was no evidence that the note in that respect was not in the same condition when signed. If it was an alteration after execution it devolved on defendant to prove it.

Defendant offered to prove by secondary evidence the contents of a resolution of the Robinson Springs Co. which resolution, in due course of business, was delivered by the Colonial Trust and Savings Bank to the Trust Co. with defendant's original notes. Such resolution, it was alleged among other things, authorized the Robinson Springs Co. to discount notes, and its president, then Richard L. Bradley, and its secretary, C. A. Thomas, to endorse same. Even if such resolution become material, which we do not hold, it contained no notice to the Trust Co. of any infirmity or defect in the title of the person or company negotiating said notes. The court also properly excluded evidence offered by defendant as to her negotiations with W. A. Thomas, or the Robinson Springs Co., at the time she delivered said notes, as there was no evidence of any knowledge on the part of the Trust Co. of such negotiations at the time it received either the original notes or the renewal notes used upon. Without,

if admitted, that said notes were put to a use not contemplated by the original parties, would not defeat title to same in the hands of a bona fide holder.

Defendant also contends that the court committed reversible error in permitting one of the Trust Co.'s witnesses to compare her signature on certain pleas filed in this case with the signatures purporting to be hers on the notes in question. As the present statute permitting proof of handwriting by comparison with writings properly in the files or records of a case, was not then in force and effect, the admission of such evidence was error. As defendant did not, however, deny her signatures to said notes such error cannot be said to be prejudicial.

This case was placed originally on the short cause calendar of the Municipal Court, over the objection of defendant. Immediately preceding the trial, defendant's counsel moved to strike said cause from the short cause calendar. The trial judge replied that he was not hearing short cause cases, and overruled defendant's motion. After the case had been on hearing for about two hours, defendant's counsel moved that the case be discontinued as the same had occupied more than one and one half hours, (the time allowed by the rule of the Municipal Court), which motion was also overruled. It does not appear that defendant was prejudiced by such ruling, nor that the court committed any abuse of discretion by overruling said motions, nor, in fact that the case was then on the short cause calendar.

The court did not err in directing a verdict in favor of the plaintiff, and the record being otherwise free from any prejudicial error, the judgment of the Municipal Court will therefore be affirmed.

JUDGMENT AFFIRMED.

478 - 21876

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ESTHER KOMINSKY,
Appellee,

vs.

HARRY ENGERT,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 299

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This case having been submitted to the court, without a jury, the court found the defendant to be the father of the bastard child of the relatrix, (which child was born April 20, 1915), and entered judgment on such finding.

It is urged by defendant that the verdict is against the manifest weight of the evidence. The relatrix testified that she had coition with defendant on only one occasion, viz: Aug. 10, 1914, although she and defendant continued to meet each other three or four times a week, until they "broke up", which was about two weeks before the following Christmas, when she informed him of her pregnancy. The defendant, at the time of the trial, was 22 years old, and was employed as a machinist helper. He denied that he had, at any time, illicit relations with relatrix. It appears from the evidence that they were engaged to be married. Defendant testified that when relatrix informed him of her condition, she told him that while at South Bend, Ind., from July 5 to Aug. 3, 1913, that "she was out automobile riding with a couple of fellows there and she says she don't remember what happened during

THE DOCKS OF THE STATE
OF DELAWARE, ex rel.
ATTORNEY GENERAL,

Appellant,

v.

CONSOLIDATED COAL
CO. ET ALIA.

No. 10, STATE SOVEREIGNTY OVER SUBMERGED LANDS OF THE BAYS.

Title once having been vested in the State, although a fact, the State cannot lose the ownership to the former of the lawful means of its retention, (Pollard v. Hagan, 44 U.S. 212), and declared Judgment be made Final.

It is hereby so ordered! Mr. Chief Justice Vinson announces the unanimous decision of the Court. The Supreme Court has the final action with jurisdiction on only one question, viz: Dec. 31, 1951, although the suit originally commenced by many other States or four years a week, until they reach the Supreme Court, which was about ten weeks before the following Christmas, when the interest hit of the total, the Supreme Court, at the close of the trial, was to prove all, and was impaired at a hearing before. In another that is not, it may then, district relations with relative. It appears from the records that many re- cords to be material. Defendant testified that when re- ference interest due of the petition, was void its the; State of South Dak., Inc., filed suit 2 to Dec. 6, 1945, that the mis- sissippi River Commission which a motion to relieve

that time". Relatrix admitted that she told defendant she was automobile riding in South Bend during the time in question, but denied that she told him "something happened to her" on that occasion, or that she had been drinking.

When we consider that the relatrix had the burden of establishing the paternity of the child by the greater weight of the evidence, the doubtful character of the evidence adduced by her leads to the conclusion that the ends of justice require another trial. Matteson v. The People, 122 Ill. App. 66, 70. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

that time". Defendant admitted that she told defendant she was automobile riding in South Bend during the time in question, but denied that she told him "something happened to her" on that occasion, or that she had been drinking.

When we consider that the relative bad the burden of establishing the potentiality of the child by the greater weight of the evidence, the doubtful character of the evidence adduced by her leads to the conclusion that the ends of justice require another trial. Patterson v. The People, 146 Ill. App. 64, 70. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

98 - 21487

E. H. LEVINSTEIN,
Defendant in Error,

vs.

D. J. DALTON, doing business as DALTON FOUNDRY COMPANY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 300

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

E. H. Levinstein brought suit against D. J. Dalton, doing business as the Dalton Foundry Company to recover $184.72 commissions alleged to be due the plaintiff, growing out of a written contract entered into between the parties. The case was tried before the court without a jury, and from a judgment entered in favor of the plaintiff for the amount of his claim, defendant prosecutes this writ of error.

The defendant operated a foundry in Indiana and was represented by the plaintiff as his agent in Chicago. On December 14, 1912, the parties entered into a written contract whereby it was agreed that the plaintiff, for a period of one year agreed to represent the defendant as salesman in Chicago and suburbs. The plaintiff was to receive as compensation five per cent of the net amount of the sales. The evidence shows that itemized statements were made out and mailed by the defendant to the plaintiff showing the several sales for the months of May to December, both inclusive. Each statement was accompanied by a voucher and check for the commissions. December 6, 1913, the November statement, check and voucher were sent to the plaintiff. In

E. S. Zimmerman,
Defendant in Error,

vs.

E. T. Dalton, Acting Secretary
of State of the State of Kansas,
Plaintiff in Error.

Error to
Supreme Court
of Kansas.

Mr. Justice Holmes delivered the opinion of the court.

E. T. Dalton, Acting Secretary of State of the State of Kansas, during business at the Dalton Foundry Company to obtain $134.72 commissions alleged to be due the plaintiff, pending suit of a written contract entered into between the parties. The case was tried before the court without a jury, and there a judgment entered in favor of the plaintiff for the amount of his claim, defendant prosecutes this writ of error.

The defendant operated a foundry in Indiana and was represented by the plaintiff as his agent in Chicago. On December 12, 1912, the parties entered into a written contract whereby it was agreed that the plaintiff, for a period of one year ending 12 February the Defendant as selling in Chicago for Dalton. The plaintiff was to receive as compensation five per cent of the net amount of the sales. The evidence shows that itemized statements were made out and mailed by the plaintiff to the defendant showing the amount sales for the months of May to December, both inclusive. Each statement was accompanied by a voucher and check for the commissions. December 9, 1913, the defendant, though not attorney sent to the plaintiff. [illegible]

that statement the defendant deducted sales amounting to $3411.50 before computing the commissions, and a check and voucher were enclosed. Upon receipt of them they were returned to the defendant and objection was made to the deductions. The defendant again returned them , claiming that the deductions were properly made. The check was then retained and cashed by the plaintiff. Suit was brought November 10, 1914 to recover commissions on account of the deductions.

The principal question before us is whether the acceptance of the check by the plaintiff amounted to an accord and satisfaction. The evidence tends to show that after the execution of the contract, no commission was paid plaintiff on account of certain sales made where there was no profit to the defendant. Plaintiff testified that some deductions were made in accordance with a verbal agreement between the parties, and some were made without any such agreement; that it was verbally agreed that such deductions might be made by the defendant on sample orders only. The defendant testified that the verbal agreement was that deductions should be made on all orders where there was no profit to him, and was not confined to sample orders. The evidence further shows that on July 3rd, in the statement and voucher made up by the defendant and sent to the plaintiff, together with a check in payment of plaintiff's commissions, two sales were deducted, one to W. D. Allen & Co., amounting to $243.53, and one to the Universal Utilities Co. for $153.55, and no commissions were paid on these sales. Upon receipt of this statement and check, plaintiff wrote the defendant: "I note that you are considering all of W. D. Allen and Universal Utilities' Work as un-

that statement the defendant declared sales amounting to $2411.80 before exhausting the commissions, and a check and voucher were enclosed. Upon receipt of them they were returned to the defendant and objection was made to the deductions. The defendant again returned them, claiming that the deductions were properly made. The check was then retained and cashed by the plaintiff. Suit was brought November 10, 1914 to recover commissions on account of the deductions.

The principal question before us is whether the acceptance of the check by the plaintiff amounted to an accord and satisfaction. The evidence tends to show that after the execution of the contract, no communication was held plaintiff on account of certain sales made where there was no profit to the defendant. Plaintiff testified that some deductions were made in accordance with a verbal agreement between the parties, and that were made without any such agreement; that it was verbally agreed that such deductions might be made by the defendant on sample orders only. The defendant testified that the verbal agreement was that deductions should be made on all orders where there was no profit to him, and was not confined to sample orders. The evidence further shows that on July 3rd, in the statement and voucher made up by the defendant and sent to the plaintiff, together with a check in payment of plaintiff's commissions, the sales were deducted, one to W. D. Allen & Co. amounting to $2443.33, and one to the Universal Utilities Co. for $106.38, and no commissions were paid on these sales. Upon receipt of this statement and check, plaintiff wrote the defendant: "I note that you are considering all as W. D. Allen and Universal Utilities' work as un-

profitable. Regarding the latter, I am not sure but in the case of the former, I was under the impression that there was a profit on the cups and stems. Kindly look into this, and if I am correct kindly credit me with the difference. To this letter, defendant replied: "With reference to Allen, will say that we suffered a loss on their work owing to its having been necessary to pour special iron into their castings and owing to the scarp. As a proof of this wish to say that I am still holding their orders of June 11 on my desk for 6000 each of the O tops and bottoms. If there was any profit in this work, would I hold this?"

Attached to the check accompanying the November statement was the following voucher:

> "The check hereto attached is for payment of above account. If not correct return at once stating reason. Endorsement on check constitutes receipt in full of above account. Detach check before presenting for payment and keep above memorandum on file."

When this voucher and statement were received, plaintiff immediately returned them to the defendant, claiming that the deductions should not have been made, referring to the written contract and requesting a remittance for the full amount of commissions without any deductions. On the next day, the defendant again mailed the check, voucher and statement to the plaintiff, claiming that the deductions were proper, and calling attention tothe unprofitable work and stating that no commissions were to be paid on such work, in accordance with numerous conversations between the parties. Six days afterwards, the plaintiff cashed the check and wrote the defendant that he had placed the amount of the check to the defendant's credit "on account."

was any profit in this end, would I help him?"

Attached to the check accompanying the November statement was the following voucher:

> "The check hereto attached in for payment of above account. If not correct return at once with- item treasm. Endorsement on check constituted receipt in full of above account. Retain check before presenting for payment and keep above memorandum on file."

When this voucher and statement were received, plaintiff immediately returned them to the defendant, claiming that the deductions should not have been made, referring to the various contracts and requesting a remittance for the full amount of consideration without deduction. On the next day, the defendant again mailed the check, together and statement to the plaintiff, claiming that the deductions were proper, and setting without further unprofitable work and stating that no communication ever to be held in such work, in accordance with numerous conversations between the parties duly done otherwise, the plaintiff cashed the check and wrote the defendant's credit "on account."

Plaintiff contends that there was no bona fide dispute between the parties; that the account was liquidated, and therefore the acceptance of the check for a less amount than the claim did not operate as a satisfaction of the entire claim. The law is well settled in this state that, where the amount due is ascertained and not in dispute, the payment by the debtor and the acceptance by the creditor of a less sum will not operate as a satisfaction of the demand, but if the amount is unliquidated, or there is a bona fide dispute as to how much is due, the payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor is a satisfaction of the claim. And if a check for such amount is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered, or it must be rejected. The acceptance of the check will satisfy the demand, although the creditor protests at the time that it is not all that is due him, or that he does not accept it in full satisfaction of his claim. Snow v. Griesheimer, 220 Ill. 106; Ostrander v. Scott, 160 Ill. 339; Canton Coal Co. v. Parlin Orendorff Co., 215 Ill. 244. In Ostrander v. Scott, supra, it was said that an account was unliquidated, although the items were not disputed, where the evidence showed there was a controversy over a set-off, and the balance due was fairly in dispute. From the foregoing, we are clearly of the opinion that the amount due the plaintiff was fairly in dispute and not liquidated when the November check, statement and voucher were received by the plaintiff. The voucher specifically stated that the check was tendered in payment in full of the items mentioned, and the acceptance of the check by the plaintiff amounted to an acceptance of the condition.

Plaintiff contends that there was no bona fide dis-
pute between the parties; that the account was liquidated, a
tantamount to the acceptance of the check for a less amount than
the claim did not operate as a satisfaction of the entire
claim. The law is well settled in this state, where the
amount due is ascertained and not in dispute, the payment
by the debtor and the acceptance by the creditor of a less
sum will not operate as a satisfaction of the demand, but
if the amount is unliquidated, or there is a bona fide dis-
pute as to how much is due, the payment of the amount claimed
by the debtor to be due in full settlement, if accepted by
the creditor is a satisfaction of the claim. And if a check
for such amount is offered in payment of a disputed account,
it must be accepted by the creditor upon the terms upon which
it is offered, or it must be rejected. The acceptance of the
check will satisfy the demand, although the creditor protest
at the time that it is not all that is due him, or that he
does not accept it in full satisfaction of his claim. Dunn
v. Kriegshaber, 220 Ill. 106; Patterson v. Scott, 160 Ill.
330; Gaston Dual Co. v. Berlin Organette Co., 218 Ill. 644.
In Patterson v. Scott, supra, it was held that an account
was unliquidated, although the items were not disputed, where
the evidence showed there was a controversy over a set-off,
and the balance due was fairly in dispute. From the fore-
going, we are clearly of the opinion that the amount due the
plaintiff was fairly in dispute and not liquidated when the
voucher check, statement and voucher were received by the
plaintiff. The voucher specifically stated that the check was
tendered in payment in full of the items mentioned, and the
acceptance of the check by the plaintiff amounted to an
acceptance of the condition.

The plaintiff further contends that there was no provision in the written contract that commissions should not be allowed for unprofitable sales, and the contract could not be varied by correspondence or conversations between the parties. No objection was made when evidence was offered tending to show that the written contract had subsequently been modified by verbal agreements. In fact the plaintiff himself was the first to testify to such verbal modifications. The record fails to show that any objection of this nature was made on the trial, and it is elementary that it cannot be urged in this court for the first time. Furthermore the evidence was competent and properly received. Snow v. Griesheimer, supra.

The judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

154 - 21546

FRED KRELL,
Plaintiff in Error,

vs.

AUGUST MEYER,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 307

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Fred Krell brought suit in the Municipal Court of Chicago against August Meyer to recover $50 rent for the month of September. The defendant in his affidavit of merits denied that he was indebted to the plaintiff for rent but admitted that he owed him $18.33 for use and occupation of the premises in question from September 1st to September 11th. The defendant also filed a set-off claiming a balance of $277.20 due him from the plaintiff upon a sale by him to the plaintiff of sixty shares of stock in the Silver Leaf Building and Loan Association, which sum he alleged plaintiff promised and agreed to pay. The plaintiff filed an affidavit of merits to the set-off, admitting the purchase of the sixty shares of stock, but averring that on June 30th, he paid for the same in full and that there was no balance due. The case was tried before the court without a jury, who found the issues against the plaintiff on his claim for rent, but allowed him $18.33 for use and occupation. The court found the issues in favor of the defendant on his claim of set-off, and entered judgment in his favor for $258.74. To reverse this judgment, the plaintiff prosecutes this writ of error.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Fred Krafft brought suit in the Municipal Court of Chicago against August Geyer to recover $50 rent for the month of September. The defendant in his affidavit of merits denied that he was indebted to the plaintiff for rent but admitted that he owed him $18.33 for use and occupation of the premises in question from September 1st to September 11th. The defendant also filed a set-off claiming a balance of $277.20 due him from the plaintiff upon a sale by him to the plaintiff of sixty shares of stock in the Silver Leaf Building and Loan Association, which was to alleged plaintiff promised and agreed to buy. The plaintiff filed an affidavit of merits to the set-off, admitting the purchase of the sixty shares of stock, but averring that on June 30th, he paid for the same in full and that there was no balance due. The case was tried before the court without a jury, who found the issues for plaintiff on his claim for rent, but allowed defendant for plaintiff on his claim for rent, but allowed him $18.33 for use and occupation. The court found the issues in favor of the defendant on his claim of set-off, and entered judgment in his favor for $259.74. To reverse this judgment, the plaintiff prosecutes this writ of error.

FILED
APR 4 1924
CLERK

Plaintiff in Error,

vs.

AUGUST GEYER,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

It appears from the evidence that the defendant owned a piece of real estate which was encumbered by a mortgage of $6000 to the Silver Leaf Building and Loan Association; that he was the owner of sixty shares of stock of the par value of $100 per share in said association; that the defendant in accordance with his agreement with the association paid $60 per month on the purchase price of said shares of stock and $30 per month interest on the loan of $6000; that on June 15, 1914, a written contract was executed by which the plaintiff agreed to purchase and the defendant agreed to sell the property encumbered by the mortgage. By the terms of the contract plaintiff paid $100 earnest money, and agreed to pay when the title was found good $4400 cash, $3500 was to be secured by a trust deed on other real estate owned by the plaintiff, and the title was to be subject to a mortgage on the premises for $3000, making a total of $11000. The contract was prepared by one Torpe a real estate broker. Afterwards plaintiff and defendant met at Torpe's office, June 30th, and the deal was then closed. The plaintiff paid the defendant at that time $7300 in cash, assumed the mortgage of $6000 to the building and loan association, and received a warranty deed to the premises; also an assignment in writing of defendant's pass-book and the sixty shares of stock in the building and loan association. The pass-book was delivered at the time, but the certificate evidencing the sixty shares of stock was in the possession of the building and loan association. The pass-book showed that the defendant had paid on account of the stock $2400, leaving a balance due of $3600. The parties then agreed that the defendant might continue to occupy the premises at a rental of $50 per month until he could obtain other property. The defendant occupied the

property until September 11th and paid the rent for the months of July and August. The evidence further shows that on July 2, 1914, the plaintiff and the defendant called on the secretary of the building and loan association, and were informed by him that there was $4.62 profit on each share of stock aggregating $277.20. It is this sum that the defendant claims in his set-off.

During the negotiations, the question of these profits was discussed by the parties, and at the time the deal was closed, June 30th, defendant claimed them. The plaintiff and the real estate broker, Torpe, both testified that plaintiff stated at that time he would not pay any of these profits to the defendant. The secretary of the association testified that on July 2nd, the defendant assigned to the plaintiff the certificate for the sixty shares of stock; that the old certificate was then canceled and a new certificate issued to the plaintiff. He further testified that the parties called on him prior to June 30th in reference to the amount due the association and as to the value of the stock, and he told them he could give them the value on the 2nd of July which he did; that afterwards in the month of August they again came to see him, and the defendant stated that the plaintiff "didn't want to, or hadn't paid him" the amount of the profits; that the witness thereupon explained to the plaintiff that if the plaintiff desired to pay the loan he would be given credit for the amount paid on the stock plus the profits.

There is not a word of testimony in the record that the plaintiff agreed to pay the defendant the amount of these profits at the time the deal was closed or at any time; on the contrary, the only evidence introduced on this

the defendant claims in his set-off.

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points was discussed by the parties, and at the time the
deal was closed, June 30th, defendant claims that. The
plaintiff was the only person broker, Jordan, both testified
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ration testified that on July 2nd, the defendant mailing
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2nd of July which he did; that afterwards in the month of
August they again came to see him, and the defendant stated
that the plaintiff didn't want to, he didn't pay him, the
amount of the profits; that the attorney explained to him the
plaintiff that if the plaintiff desired to buy the
stock from him he would be given credit for the amount paid on the
mortgage until September 1lth and paid the rent for the
months of July and August. The evidence further shows that
on July 2, 1919, the plaintiff and the defendant called at
the secretary of the building and loan association, and
were informed by him that there was $6.88 profit on each
share of stock outstanding @117.50. It is this sum that

subject is that the plaintiff refused to pay these profits. Counsel for the defendant, however, argues that the purchase price of the real estate mentioned in the written contract between the parties was $11000, and that unless plaintiff is required to pay the amount of the profits, he will obtain the property for less than the contract price. From what we have already said, it clearly appears that the written contract was materially modified when the deal was closed. The plaintiff paid the defendant $7300 cash when the deal was closed, whereas the contract provided that he should pay only $4400 cash; he assumed a mortgage of $6000 to the building and loan association and received an assignment of defendant's pass-book and sixty shares of stock in said association, while the contract provided that the deed should be made subject to a mortgage of $3000 and no mention was made in the contract of the shares of stock or the pass-book. When the plaintiff executed the written assignment of the pass book and the stock on June 30th, no mention was made of the profits in the assignment, and the same is true when the stock certificate was assigned on July 2nd, and as the only testimony touching the payment of these profits is that the plaintiff refused to pay them, or any part of them, there is no evidence to sustain the finding and judgment of the trial court.

The judgment must therefore be reversed, but as a jury was waived and all the facts are before us, no reason exists for remanding the cause. The defendant admitted he owed the plaintiff $18.33 for use and occupation of the premises, and the court so found.

premises, the jury so found.

owed the plaintiff $10.33 for use and occupation of the
mature for assuming the same. The defendant admitted he
a jury was waived and all the facts are before us, we reve

The judgment must therefore be reversed, and as
limiting and judgment of the trial court.

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of those profits is that the plaintiff refused to pay them,
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case is true when the check certificate was received on
mention was made of the profits in the assignment, and the
assignment of the boss work and the stock on June 30th, he
the part-payment. When the plaintiff accepted the written
tion was made in the amount of the shares of stock or
should be more applied to a mortgage of $5000 and no men-
ownership, while the contract provided that the deed
of defendant's part-pay was still shares of stock in said
building and loan association and received an assignment
pay only $1500 cash; in exchange a mortgage of $6000 to the
was closed, whereas the contract provided that he should
the plaintiff paid the defendant $2500 cash when the deal
ran contrary was materially modified when the deal was clo
must be made already said, it clearly appears that the mis
obtain the property for less than the contract price. From
ment between the parties was $1500, and that unless plain
tiff is required to pay the amount of the profits, he will
dence bring of the real estate mentioned in the written con
tract for the purchase, however, except that the pur-
chaser is not the plaintiff refused to pay those profits.

The judgment of the Municipal Court of Chicago will be reversed and judgment entered in this court in favor of the plaintiff for $18.33.

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

The judgment of the municipal Court of Chicago will be reversed and judgment entered in this court in favor of the plaintiff for $18.94.

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

194 - 21587.

JOSEPHINE DUGAN,
Defendant in Error,

vs.

INTERNATIONAL ASSOCIATION OF BRIDGE & STRUCTURAL IRON WORKERS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 308

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Josephine Dugan, plaintiff, brought suit in the Municipal Court of Chicago against the International Association of Bridge & Structural Iron Workers, defendant, to recover $100, death benefit alleged to be due her as widow and sole heir at law of Frank J. Dugan, deceased. The case was tried before the court without a jury, and a judgment entered in favor of the plaintiff for the amount claimed.

It appears that Frank J. Dugan became a member of the defendant association in 1897, and under the constitution and by-laws of the association it was obligated upon his death in good standing, to pay the sum of $100 to his widow. The first contention of the defendant is that Frank J. Dugan was not a member in good standing at the time of his death.

The evidence tends to show that Frank J. Dugan was a member of local union No. 1 of the defendant association which was located in Chicago; that one Richard H. Houlihan was financial secretary of said local union No. 1; that the duties of the local financial secretary were to deliver membership books issued by the association as evidence of membership to new members; collect assessments and dues from

Defendant in Error.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

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It appears that Frank J. Dugan became a member of the defendant association in 1897, and under the constitution and by-laws of the association it was obligated upon his death in good standing, to pay the sum of $100 to his widow. The first contention of the defendant is that Frank J. Dugan was not a member in good standing at the time of his death.

The evidence tends to show that Frank J. Dugan was a member of local union No. 1 of the defendant association which was located in Chicago; that one Richard E. Morris was financial secretary of said local union No. 1; that the duties of the local financial secretary were to deliver membership books issued by the association as evidence of

the members and enter such payments in the membership books; transmit such dues to the main office of the association at Indianapolis; on the death of a member, obtain the membership book and certificate issued to such deceased member and transmit them to Indianapolis, collect from the defendant association the amount of the death benefits and deliver the same to the beneficiary, Frank J. Dugan died about four o'clock P. M. , September 1, 1913, which was Labor Day and the preceding day, August 31st was Sunday. Dugan paid the monthly dues from the date he became a member of the association to and including the month of July, 1913, the payment of the July dues being made on August 11, 1913. This was the last payment made. At the time of his death, he had not paid his dues and assessments for the months of August and September, 1913. The by-laws which were binding on Dugan and the defendant provided, among other things, that $100 should be paid on the death of each member in good standing, on presentation of proof of death; that upon the death of a member his membership book was to be delivered up; that it should show that the dues for the current or preceding month were paid; that to be entitled to the benefit of $100 the member at the time of his death "must not be more than thirty days in arrears;" that "all monthly dues are payable in advance." The plaintiff was the widow of Frank J. Dugan, deceased, and the death benefit was payable to her. The membership book was delivered to secretary Houlihan as provided for by the by-laws.

Houlihan testified that it was customary for members to pay their dues and assessments at all times during the month, and that the office of the local union in Chicago was not open for the payment of dues nor for any other purpose

for of the 14-laws.

Section 1. The Grand Secretary shall keep a book wherein he shall enter the names of all members of the Association, and the date of their admission, and the name and residence of the person designated by each member as the beneficiary to whom the benefit provided for by these laws shall be paid in case of the death of such member, and shall enter in said book the name and residence of any person designated by any member as beneficiary in place of the person previously designated, and the date of such change, and shall enter in said book the name and residence of any person to whom the benefit provided for by these laws shall be paid in case of the death of any member

on September 1, 1913.

From this it clearly appears that the provision of the by-laws requiring members to pay dues and assessment monthly in advance was waived by accepting them at any time during the month. The rules and by-laws of a benefit society should be liberally construed, and in case of an attempt by a society to declare a forfeiture will be most strictly construed against it. Coverdale vs. Royal Arcanum, 193 Ill. 91. In this state it is well settled in a long line of decisions that a failure on the part of a member to comply with the provisions of a by-law requiring prompt payment of assessments may be waived, so that the failure of a member to strictly comply with such regulation will not work a forfeiture of his rights. Falkinberg v. Modern Amer. Fraternal Order, 149 Ill. App. 622; Loyal Americans v. Mayer, 137 Ill. App. 574. In view of the foregoing authorities, and considering the fact that the last of August was Sunday and the first day of September was Labor Day, together with all the circumstances of the case, we are clearly of the opinion that the defendant should not be permitted to forfeit plaintiff's rights by such a rigid construction of the contract.

Defendant next contends that its motion to quash the summons and dismiss the suit, on the ground that the service of process was not sufficient to obtain jurisdiction of the defendant, should have been sustained. In support of this contention it is argued that the testimony shows that the defendant was not a corporation but a voluntary association; consisting of local unions throughout the United States; that the witness Houlihan testified that the defendant was not a corporation; that it was not incorporated under the laws of any state, but was a mere voluntary association composed of thousands of members. On cross-

on September 1, 1913.

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144 Ill. App. 632; Royal Americans v. Boyer, 137 Ill. App.
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the summons and dismiss the suit, on the ground that the
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of the defendant, should have been sustained. In support
of this contention it is argued that the testimony shows
that the defendant was not a corporation but a voluntary
association; consisting of local units throughout the
United States; that the witness Hamilton testified that the
defendant was not a corporation; that it was not incorpor-
ated under the laws of any state, but was a mere voluntary
association composed of thousands of members. On cross-

examination, however, this witness testified that he did not know whether the defendant was incorporated under the laws of Ohio or Indiana. From an examination of the record, we are of the opinion that the defendant was properly served. The defendant, International Association of Bridge & Structural Iron Workers, had an organization consisting of a president, first vice-president, board of directors, secretary and treasurer, a constitution and by-laws, and a common seal. Its name implied a corporation, and under the law it is estopped from denying its corporate existence. United States Express Co. v. Bedbury, 34 Ill. 459; Fitzpatrick v. Rutter, 160 Ill. 282. In the case last cited, after holding that the Switchmen's Mutual Aid Association of North America was estopped to deny its corporate existence on the ground that it had an organization consisting of directors, a president, secretary and other officers, and a common seal, the court said (286): "However, if it be conceded that it is but a voluntary association, it is not necessary, as is urged by counsel for appellant, that all the members of the association be made parties and each be served with summons. In general all persons interested in the subject-matter in controversy should be made parties. But there are exceptions to this rule. The members of the Switchmen's Mutual Aid Association of North America are scattered over almost every State of the Union and in Canada, and service in the manner contended for would be impossible, and to require it would be to deprive the complainant of all remedy. Where the parties are numerous and it is impracticable to bring all before the court, as in this case, service upon a part, who act for other members of the association as well as themselves, will be a sufficient service upon the whole. (Guilfoil v. Arthur, 158 Ill. 600.)"

Under this authority, we are clearly of the opinion that the service of process was sufficient.

We have examined the other contentions of the defendant and find them without merit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

29 - 21262

NORA KENNEDY,
Administratrix of the Estate
of John Kennedy, Deceased,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
A Municipal Corporation, The
Belt Railway Co. of Chicago,
A Corporation, Chicago & Western
Indiana Railroad Co., a Cor-
poration, and Chicago, Rock
Island & Pacific Railway Co.,
A Corporation,
Defendants in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

202 I.A. 313

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks, by this writ of error, to reverse a judgment against her for costs, found in favor of defendants in error. By her suit in the Circuit Court plaintiff in error sought to recover damages for the death of her intestate, which was alleged to have resulted from the negligence of the defendants in leaving holes in 95th Street where it was crossed by the tracks of the railroad company defendants. At the trial, the evidence offered on behalf of the plaintiff tended to show that the hole complained of was not in the portion of the street crossed by the railroad tracks, but was from seventy-five to one-hundred feet therefrom; there was no evidence of the length of time that the hole had existed. At the conclusion of this testimony, plaintiff's counsel asked leave to withdraw a juror and to continue the case, but upon carefully reading the statement made by counsel in support of this motion, we are of the opinion that it is not sufficient to enable us to say that

Defendants in Error.

No. 19031A. 8139

No. 19031A DOCKETED January the eighth of the

COURT.

The plaintiff in error seeks, by this writ of error, to reverse a judgment against her for costs, found in favor of defendants in error. By her suit in the district court plaintiff in error sought to recover damages for the death of her intestate, which was alleged to have resulted from the negligence of the defendants in leaving holes in 95th Street where it was crossed by the tracks of the railroad company operated. At the trial, the evidence offered on behalf of the plaintiff tended to show that the boys who played at and met in the portion of the street crossed by the railroad tracks, but who knew perfectly-like to cross-hopping that obstruction; there was no evidence of the length of time that the hole had existed. At the conclusion of the plaintiff's evidence, defendants moved that the action be dismissed. The motion was sustained, and plaintiff's counsel stated to withdraw a juror and to consider the case, but upon subsequently hearing the statement of counsel in support of this motion, we are of the opinion that it is not sufficient to confine us to any

Defendants in Error.

vs.

Plaintiff in Error,

of Cook County, Defendant,
Administratrix of the Estate
Ellen Conway,

CLERK OF SUPREME COURT.
A Municipal Corporation, The
Rail Railway Co. et Others,
& Corporation, Chicago & Western
Indiana Railroad Co., a Cor-
poration, and Chicago, Rock
Island & Pacific Railway Co.,
A Corporation,

ERROR TO

DISTRICT COURT

ROCK CREEK

the court abused its discretion in denying the motion, and while the action of the court in so denying the motion is assigned as error, that assignment is not relied upon in plaintiff in error's brief or argument. Upon the denial of the motion for leave to withdraw the juror, counsel for plaintiff declined to take a non-suit for the reason that the statute of limitations had run. Among other things he said: "Your Honor, as I say, the only thing you can do is to dismiss our case. I am not able to go on with my evidence." The Court: "Well, that makes it an involuntary nonsuit." Counsel: "I don't want that an involuntary nonsuit; that is what I desire, I don't want any voluntary nonsuit because that will preclude me from any rights under the statute." The Court: "The plaintiff refuses to proceed and that makes an involuntary nonsuit. In this case this suit is dismissed by order of court. Plaintiff declines to proceed any further, and not having made out a case, as you can see, the court directs that there be a nonsuit, and suit dismissed." Thereupon, an order was entered of record ordering the plaintiff to take a nonsuit, and judgment was entered in favor of defendants and against the plaintiff for the costs of the suit.

It is the well settled law of this State that where the evidence introduced by the plaintiff lacks all the essential elements necessary to prove his right to recover, the court may cause a nonsuit to be entered in the cause, and that a nonsuit so entered is involuntary. (Holmes v. C. & A. R. R. Co. 94 Ill. 439; Boyce v. Snow, 187 Ill. 181.)

We have carefully examined the evidence offered in this case, and are clearly of the opinion that it was totally insufficient to justify a verdict against any of the

defendants, and that in these circumstances the action of the court in ordering an involuntary nonsuit was proper. It may be noted here that this must also have been the view of counsel who tried the case for plaintiff in error, since nowhere does it appear that he objected to the action of the court now complained of.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

321 - 21305.

mechanic's lien
sale

RELIANCE ELEVATOR COMPANY,
(Complainant),
Appellee,
vs.
MICHAEL ZIMMER, Sheriff, etc., et al., and ARTHUR A. FRANZKE,
(Defendants),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 315

MR. JUSTICE GOODWIN delivered the opinion of the court.

The appellants seek to reverse a decree entered in the Circuit Court, directing the delivery to the appellee of a master's certificate of sale of certain property, and the payment to him of the moneys received by the sheriff for the redemption of the real estate described therein. The bill of complaint in the cause recited that the ~~appellee~~ complainant purchased certain real estate sold at the master's sale, and received the master's certificate; that it never assigned or sold the certificate to any person, and that the defendant Franzke, who claimed to be its owner, had no right, title, or interest in or to the certificate.

~~The evidence disclosed that~~ One J. A. Coleman was employed as the attorney for the ~~appellee~~ complainant in the proceedings which resulted in the sale of the property for which the certificate of sale was issued; that ~~appellee~~ complainant desired to realize money on the certificate, and through its officers discussed the matter with Coleman, who told them that the LaSalle Street National Bank might make a loan; that thereupon it was endorsed "Reliance Elevator Company, per A. C. C. Anderson, Secy., C. E. Anderson, Pres.," with the name of the LaSalle Street National Bank written just above the endorsement, and in that condition was turned over to Coleman. This was some time in the summer of 1912, and on October 2nd of that year, Coleman sold and delivered the certificate to one

Clark, for $1,600 in cash. At that time, the words, "LaSalle Street National Bank" had been erased by some chemical wash, and Coleman had written over and directly to the left of the signature of the Reliance Elevator Company, the following words, "The Reliance Elevator Co. hereby assigns this claim and certificate to J. A. Coleman." About one inch underneath was written by Coleman, "I assign this certificate to _____ and guarantee the validity thereof and to render all services in regard thereto free of charge. J. A. Coleman." At the time of the transaction, Mr. Clark wrote his name in the blank, and December 4th, 1912, notified the master that he had purchased the certificate. December 9th, 1912, Clark assigned the certificate to the ~~appellant~~ defendant Franzke for a consideration of $2,280.80. The erasure was done in such a way that it could have been discovered only upon a very careful examination of the certificate. ~~Appellee~~ complainant learned of the Franzke claim some time in February, 1913, and in March, 1913, made a demand upon the sheriff for the payment to the company of the redemption money. The sheriff refused to comply because the company did not have physical possession of the certificate, and thereupon the bill was filed. Both Mr. Clark and Mr. Topliff acted, in all respects, in good faith. ~~The foregoing facts were substantially those~~ Findings of fact found by the master, and they are amply supported by the evidence. The master further found that there was no negligence on the part of the complainant or its officers; that the equities were with the complainant, and that it was entitled to a decree. The chancellor approved the master's report, and entered a decree in favor of the complainant, ~~who is the appellee here~~.

The first contention of the appellants that an endorsement of the master's certificate in blank is a legal assignment has no bearing on this case, since the evidence discloses that at the time of the endorsement, the

words, "The LaSalle Street National Bank," were written above it, and for the same reason we think the contention that one who has ## endorsed #### an instrument in blank, and left it with his attorney, is estopped to deny the ownership of a bona fide purchaser, is likewise not involved here. Defendant further contends, however, that an erasure does not invalidate an instrument where it is an immaterial alteration, but we are clearly of the opinion that the erasure of the words, "The LaSalle Street National Bank," was a material alteration, and as it was made without the authority of the appellee, it amounted to a forgery. The words, "The LaSalle Street National Bank," written above the signature of the Reliance Elevator Company, of necessity had a limiting effect upon the endorsement, as they clearly designated the LaSalle Street National Bank as the intended endorsee, and authorized it to write in the blank space above any words which it might think necessary to make the endorsement or assignment effectual. So long as they remained on the paper, they prevented any endorsement being written in purporting to transfer the title to any other party, and clearly gave notice to anyone who might see them that the appellee had authorized the endorsement to the LaSalle Street National Bank, but to no one else. The further contention of appellants that such an erasure does not invalidate the instrument when done by an agent of the party, likewise has no bearing on this case, for it nowhere appears that J. A. Coleman had authority to make the alteration, and the appearance of the words, "The LaSalle Street National Bank," conclusively established an intention upon the part of the appellee to limit Coleman's authority, since it is totally inconsistent with an intention to clothe him with authority to transfer title to any other purchaser. Undoubtedly, appellee did authorize him to find a purchaser, but that is quite another matter.

It is also true, as appellant contends, that if the alteration by the agent was a mere spoilation, it would not invalidate the endorsement, but it must be remembered that, in such a case, the endorsement could only be effective for the purpose of transferring title to the person named before the spoilation took place. In other words, even after the erasure, the endorsement would still have been effective to transfer the title to the LaSalle Street National Bank, but to no one else. We think, also, that there is nothing in the contention that appellee was negligent in leaving the instrument in the hands of Coleman, since the endorsement was, as we have found, limited in such a way as to prevent him from transferring it to any one except the LaSalle Street National Bank. They were not bound to anticipate that he might commit a crime and obtain money by forgery. As the evidence clearly shows that the original endorsement was not sufficient to pass title to Clark, since it was in terms limited to the LaSalle Street National Bank, and that the change made in the endorsement was material and unauthorized, no title or interest passed under that altered endorsement. (Chicago Edison Company v. Fay, 164 Ill. 323; Fay v. Slaughter, 194 Ill. 157; Hayes v. Wagner, 220 Ill. 256.)

Counsel for appellants further contend that the relief was improperly granted because it did not require the appellee to do equity. By placing the certificate, with a limited endorsement upon it, in the hands of Coleman, appellee did not empower him to defraud Clark or Franzke or anybody else. The loss was due to Coleman's unlawful act in altering the instrument, and not to any negligence on the part of the appellee.

We are therefore of the opinion that the

evidence preserved in this record sustains the findings of the master's report and the decree of the chancellor entered thereon. The decree of the Circuit Court is, therefore, affirmed.

AFFIRMED.

(OVER)

(OVER)

MR. PRESIDING JUSTICE O'CONNOR dissenting:

In a mechanic's lien suit in which appellee was complainant, the real estate involved was sold by the master in accordance with a decree of court, and a certificate of sale, dated December 12, 1911, issued to appellee. The certificate was delivered to J. A. Coleman, solicitor for complainant. Afterwards appellee, owner of the certificate, endorsed the same, and on October 2, 1912, Coleman assigned and sold the certificate to Francis H. Clark, an attorney, for $1600. December 9, 1912, Clark, for a consideration of $2280.80 assigned and sold it to Arthur A. Franzke, appellant. Before the period of redemption had expired, a judgment creditor deposited with Zimmer, sheriff, sufficient money to redeem from the master's sale. Both appellee and appellant claimed to be the owner of the master's certificate and the money deposited. Appellee filed its bill praying that it be adjudged the owner of the redemption money and certificate. Afterwards the appellant filed a cross-bill praying that he be decreed the owner of the certificate and redemption money. The case was heard before a master who recommended that the relief prayed for in the original bill be granted and the cross-bill dismissed. Objections and exceptions to the report were overruled and a decree entered in accordance with the recommendations of the master.

Coleman failed to account to the appellee for the $1600 but converted the same to his own use and absconded, leaving Chicago for Seattle, Washington. The original certi-

ficate shows that at the time of the sale to Clark, it bore the following endorsement:

> "The Reliance Elevator Co.
> hereby assigns this claim and
> Certificate to J. A. Coleman,
>
> RELIANCE ELEVATOR COMPANY
> Per A.C.G. Anderson, Secy.,
> C.E. Anderson, Pres."

Coleman at the time endorsed the certificate as follows:

> "I assign this certificate to_____
> and guarantee the validity thereof and
> to render all services in regard thereto
> free of charge.
> J. A. Coleman."

Clark wrote his own name in the blank space, paid Coleman and received the certificate.

At the time of the sale to appellant, Clark endorsed the certificate as follows:

> "Chicago, Ills. Dec. 9,1912.
> In consideration of $2280.80 heretofore received by me from Arthur A. Franzke, I hereby assign, transfer and set over to said Arthur A. Franzke all my right, title and interest in and to the within certificate and the real property therein described.
> Francis H. Clark.
> Witness: Wyllys K. Bliss Witness."

The appellee contends that when the certificate was endorsed by it there was written immediately over its name the following: "La Salle Street National Bank;" that these words were afterwards erased by Coleman without authority; that all the other endorsements of the certificate as above set forth were made without authority or knowledge of appellee; that when the certificate was delivered by appellee to Coleman it was specifically assigned to the bank, and that the alteration by Coleman was unauthorized

Elevator Agency [illegible] at the time of the sale to Clark, it here-
the following endorsement:

"The Reliance Elevator Co.
hereby assigns this claim and
certificate to J. A. Coleman,

RELIANCE ELEVATOR COMPANY
Per A.C.B. Anderson, Secy.,
C.E. Anderson, Pres."

Coleman at the time endorsed the certificate as follows:

"I assign this certificate to _____
and guarantee the validity thereof and
to render all services in regard thereto
free of charge.
J. A. Coleman."

Clark wrote his own name in the blank space, paid Coleman
received the certificate.

At the time of the sale to Appellant, Clark en-
dorsed the certificate as follows:

"Chicago, Ills. Dec. 9,1933.
In consideration of $2000.00 heretofore re-
ceived by me from Arthur A. Brenke, I here-
by assign, transfer and set over to said Arthur
A. Brenke all my right, title and interest in
and to the within certificate and the real
property therein described.
Witness: Phyllis E. Allen Miriam." Thomas N. Clark.

The appellee contends that when the certificate
was endorsed by it there was existing immediately over its
name the following: "In Cook County Tentenni Year;" that
there would have otherwise existed by following without
ambiguity; that all the other endorsements of the certifi-
cate do show and that they might without ambiguity or
knowledge of anybody; that when the certificate was deliv-
ered by appellee to Coleman it was specifically assigned to
the bank, and that the signature by Coleman was immaterial

and the subsequent sale to Clark and Franzke conveyed no title. Upon an examination of the certificate it clearly appears that the sizing of the paper immediately above appellee's name and extending almost the entire width of the paper, has been removed.

Appellee was a corporation, and its officers were John A. C. Anderson, treasurer; Adolph C. G. Anderson, secretary, and C. E. Anderson, president.

John A. C. Anderson, treasurer, testified he first saw the certificate in December, 1911, in the office of appellee; that appellee first got the certificate in the summer of 1912. He then said that appellee first got it in December, 1911, and kept it until the summer of 1912,-- "some time 1912." He stated that a meeting was held at appellee's office, and the secretary was authorized to negotiate with Coleman in obtaining a loan; that Coleman stated at that time the bank would make the loan. "Mr. Cassels: Q And the name of the La Salle Street National Bank was written in above here? A It was. Mr. Waugh: I object to those questions. The Master: I should think it would be proper to ask him who wrote that name in there; who wrote it, and when?" The master's question was never asked nor answered. He afterwards stated that he saw C. E. Anderson endorse it in Coleman's office, which was about two weeks after the meeting in the office of appellee. He admitted that he told Coleman he could sell the certificate to the bank "for the purpose of getting a loan" after he had previously stated that he never talked with Coleman about the certificate except in reference to its being returned. He further testified that Adolph Anderson, secretary, was the only one that negotiated with Coleman in

the paper, has been received.

Ypsilon was a corporation, and its officers were John A. C. Anderson, treasurer; Adolph G. G. Anderson, secretary, and G. K. Anderson, president.

John A. C. Anderson, treasurer, testified he first saw the certificate in December, 1911, in the office of Appelius; that Appelius first got the certificate in the summer of 1910. He then said that Appelius first got it in December, 1911, and kept it until the summer of 1912.-- "some time 1912." He stated that a meeting was held at Appelius's office, and the secretary was authorized to negotiate with Coleman in obtaining a loan; that Coleman stated at that time the bank would make the loan. "Mr. Cancelo: Q And the name of the La Salle Street Bution Bank was written in above mine? A It was. Mr. Bennett: I object to these questions. The Master: I should think it would be proper to ask him who wrote that name in there; who wrote it, and why." The master's question was never answered. He afterwards stated that he saw G. K. Anderson endorse it in Coleman's office, which was about the middle of the meeting in the office of Appelius. He admitted that he told Coleman he could get the certificate to the bank "for the purpose of getting a loan" after he had previously stated that he never talked with Coleman about the certificate except in reference to its being returned. He further testified that Adolph Anderson, secretary, was the only one that negotiated with Coleman in relation to the loan, and the only one that had anything to do with the certificate except in reference to its being returned.

Upon an examination of the certificate it clearly appears that the sliding of the paper immediately above the title and the endorsement on the certificate were made subsequent only to Clark and Peacock obtaining it

making the loan, and it clearly appears from his own testimony that he did not know anything about the arrangements which Adolph had made with Coleman. He further testified he made demands on Coleman for the return of the certificates on an average of twice a week during the latter part of 1912, and the beginning of 1913, and that Coleman gave so many excuses that he could not remember them all. At times Coleman said the certificate was on file in court; at other times, that some other attorneys had it for examination. He admitted, however, that he made no effort to investigate whether the statements made by Coleman were true, and did not attempt to find out the names of the lawyers, or for what purpose they were examining the certificate. It is certainly unusual to say the least that, as appellee was endeavoring to borrow money on the certificate, so many demands should be made and excuses given without appellee's taking some more definite and positive steps to secure the certificate.

Adolph C. G. Anderson, secretary, testified he first saw the certificate in December, 1911, in Coleman's office; that it was not then endorsed; that he took it to appellee's office, where it was kept six or seven months, when he returned it to Coleman's office, where it was assigned to the La Salle Street National Bank. "Mr. Cassels: Q What did he (Coleman) say? A. He said he would secure a loan for us, for the Reliance Elevator Company and it would be approximately $1000. Q.And was there anything else said -- from whom? A. From the La Salle Street National Bank." The witness further testified that at that time he stamped appellee's name with a rubber stamp on the back of the certificate and signed his name as secretary, but he

nowhere states that he wrote the words, "La Salle Street National Bank" on the certificate; nor does he state specifically who did write the bank's name on the certificate, or that it was written on the certificate at all when he signed it nor does he say he intended that the certificate be assigned to the bank. He testified further he next saw the certificate in Coleman's office about two weeks later and in the meantime the endorsement had been signed by C. E. Anderson, president, and that all these transactions took place in Coleman's office in the Rookery Building. He testified further that the last time he heard of Coleman was in February, 1913; that appellee's officers made inquiry as to his whereabouts of everyone they knew who was acquainted with Coleman, but he admitted that the only one of whom they inquired was the office girl at the office formerly occupied by Coleman.

C. E. Anderson, president, testified that he signed the endorsement on the certificate in Coleman's office in the Ashland Block in the "early spring of 1912." On rebuttal, however, after the witness Whittemore had testified to a conversation which he had with Coleman prior to May, 1912, relative to the certificate, the witness stated that he signed the certificate "some time in June, 1912." Whittemore had testified that Coleman told him that he had the certificate for sale and requested Whittemore to find a purchaser for it; that Whittemore endeavored to sell it to the Standard Oil Co., it being interested in the property covered by the certificate; that he submitted the proposition to the Standard Oil Co., but they were not interested in the proposition. These transactions, Whittemore stated, all happened prior to May 1,

1912. No explanation is given by Anderson for the discrepancy in his testimony. If Whittemore's testimony was true, it appears that the certificate was in Coleman's possession for a much longer period of time than is shown by appellee's testimony, and grave doubt is cast upon the entire transaction as contended for by appellee. The witness further testified that he knew nothing about the negotiations with Coleman, as these were carried on by Adolph Anderson, the secretary.

From the foregoing it clearly appears that each of the Andersons contradicted himself frequently, and that each also contradicted the others. John Anderson testified, as appears from the questions and answers above quoted, that the name of the bank was written on the certificate in appellee's office, at a meeting of its officers; Adolph Anderson, the secretary, testified it was assigned in Coleman's office when no one was present but himself and Coleman. John Anderson further testified that Coleman was present at the meeting of appellee's officers at its office. Neither of the other Andersons make any mention of this, but from Adolph's testimony it appears that Coleman was not at the meeting. A further contradiction appears in that Adolph testified that he left the certificate in Coleman's office in the Rookery Building; that he next saw it about two weeks afterwards in the same place, it having been signed in the meantime by C. E. Anderson, president. C. E. Anderson and John both testified that C. E. Anderson signed it in Coleman's office in the Ashland Block.

From a careful examination of all the evidence in the record, it clearly appears that none of appellee's officers suggested that the loan be made from the bank; they all agree that the bank was suggested by Coleman.

-

[illegible] Be explanation is given by Anderson for the dis-
[illegible] already in his statement. In Chittenden's testimony and
[illegible] time, it appears that the objective was in Quimby's
[illegible] possession for a week longer period of time than is known
[illegible] Mr Kingsley's testimony, and there might be many days in
[illegible] entire transaction he contained for by Quimby. The
[illegible] Quimby testified that he knew nothing about the
[illegible] Chittenden with Quimby, he (Quimby) was first told of
[illegible] of the Anderson contract himself [illegible], and that
[illegible] case also contradicted the above. Then Anderson testified
[illegible] he ordered from the question and answers above quoted, the
[illegible] name of the Bank was entered on the certificate in
[illegible] Chittenden's office, at a meeting of the officers; Wright
[illegible] Anderson, the secretary, testified it was assigned in the
[illegible] man's office upon no the new present but himself and Quimby
[illegible] the meeting of Chittenden's office. Anstaar
[illegible] of the Quimby Anderson note and mention of this, but item
[illegible] Wright's testimony it appears that Quimby was not at the
meeting. A further contradiction appears in that Wright
testified that he left the certificate in Chittenden's office
in the Mechanic Building; that he next saw it about two weeks
[illegible] John Mack testified that E. E. Anderson signed it in Chitten-
[illegible] den's office in the Mechanic Block.

Then a careful examination of all the evidence in
the record, it clearly appears that many of Quimby's
statements contained that the loan be made from the bank;
[illegible] it seems that the bank was interested in Quimby;

It is not contended that there was any particular reason why appellee wanted to borrow the money from the bank, and it is clearly apparent that it was immaterial to appellee from whom the money was obtained. There is not a word of testimony in the record showing for what period of time the loan was to be obtained, not as to the rate of interest that appellee would be required to pay, nor as to whether it would be necessary to execute any additional papers to obtain the money, nor was the amount to be borrowed mentioned, except that Adolph testified Coleman said it would be approximately $1000. Adolph testified that two weeks after the certificate was delivered to Coleman he learned there was some difficulty in obtaining the money from the bank, and shortly thereafter was informed that the money could not be borrowed from the bank. He does not testify that he made any demand on Coleman for the return of the certificate, and no one appears to have made such demand except John Anderson, the treasurer, which he states he did in the latter part of 1912, which was, according to their testimony, long after they knew the bank would not make the loan, and after Coleman had sold the certificate to Clark, October 2, 1912. The testimony of each of the Andersons is pregnant with discrepancies and incongruities and their testimony taken as a whole is extremely indefinite and uncertain. No one testified as to who wrote the words, "La Salle Street National Bank", if they were written, on the certificate although this point was specially pointed out by the master. After a very careful consideration of all the evidence, I am of the opinion that the certificate was turned over by appellee to Coleman with full authority to dispose of it as he saw fit.

The appellant was guilty of no negligence, he having been represented by counsel at the time he purchased the certificate from Clark, and no alterations were apparent at that time; the same is true when Clark purchased it from Coleman. I am of the opinion that appellee, to say the least, was not free from negligence, and where one of two innocent persons must suffer on account of the dishonesty of a third, the burden should fall upon the party who made the commission of the fraud possible. Coleman was clothed with the indicia of ownership by appellee and as the appellant and Clark acted in good faith, (which is conceded by appellee) the appellant should be protected in a court of equity as against appellee. Johnson v. Milmine, 150 Ill. App. 208; McCarthy v. Crawford, 238 Ill. 38. I am therefore of the opinion that the equities of the appellant are superior to those of appellee and that he should be awarded the certificate and the redemption money deposited with the sheriff.

21378

391 - 21378.

JENNIE MALMQUIST

vs.

BILDEN MANUFACTURING COMPANY.

APPEAL FROM

On Appeal of BILDEN MANUFACTURING COMPANY, Appellant,

vs.

VINCENT G. GALLAGHER and ERNEST MESSNER, Appellees.

CIRCUIT COURT,

COOK COUNTY.

202 I.A. 316

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to set aside a judgment in favor of appellees, for $2,700, entered against it in a proceeding to enforce an attorney's lien. It appears from the evidence that the appellees entered into a contract with their client, under which they were to represent her in a certain personal injury matter, and were to receive a contingent fee of one-third of any amount which might be paid before suit, and one-half of the amount which might be recovered or obtained after suit. Appellees mailed appellant a notice of lien, dated July 24th, 1914, and after suit had been begun, obtained personal service of a second notice of lien, dated August 29th, 1914. These notices, which were identical in substance, set out that an agreement had been made between the client and appellees, under which they were to prosecute her claim, and that by the terms of the agreement they were to receive for their service fifty per cent. of any sum realized on said claim or cause of action. While this notice is objected to as insufficient, it seems clearly to comply with the terms of the statute, which only require a notice in writing claiming the lien and stating the interest which the attorneys have in the suit, claim, demands, or causes of action.

2052A.316

Counsel for appellant further contend that appellant's agreement with appellees' client was for the payment to her of $2,700, and an additional payment to appellees of $900; while for appellees it is contended that the evidence shows that appellant agreed in terms with their client to pay them $2,700, - an amount equal to that paid to her. The record cannot be read, however, without coming to the conclusion that regardless of whether the sum of $900 or $2,700 was named, there was a distinct agreement on the part of appellant that the $2,700 paid to appellees' client should be her own, and free from any claim by her attorneys. This is very clear from the testimony of Mr. Carlin, the adjuster for the insurance company which acted for the appellant in the matter, who said that he made an agreement with appellees' client to pay her $4,000, and let her pay her attorneys out of that; that when she said she had a contract with her attorneys for one-third in case of settlement, and fifty per cent. in case the matter was tried in court, they computed her interest at $2,700, and that her attorneys were entitled to the balance of $1,300. This clearly shows an intention to discharge her obligation to her attorneys. Carlin further stated that the $2,700 she was to receive was to be "clear for herself." Under the contract, appellees were entitled to receive the same amount as that paid their client. Appellant's agreement with appellees' client was, therefore, according to the testimony of its own witness, to discharge her obligation to them and leave her in a position to retain her $2,700 "clear for herself," which could only be done by the payment to her attorneys of an amount equal to what she herself received. In these circumstances, what is, in law, the amount of their enforceable lien? We think this question is fully settled by the decision of

our Supreme Court in Sutton v. Chicago Railways Co., 258 Ill. 551. In that case, a settlement was made with the client for $365, and an agreement was entered into to pay the attorney "a reasonable fee, whether on account of your written contract with him or otherwise earned by him." The agreement between the attorney and client in that case had been for one-half of any amount recovered. The court say, at page 554:

> "The agreement on the part of appellee to pay the fee of appellant was just as much a part of the consideration for the release by Speicher of his claim against appellee as the cash which was paid him, and that, together with the cash paid, represented the full amount of the settlement. The lien of appellant attached to the whole amount represented by this settlement agreement, and under his contract he was entitled to one-half of the same. Having notice of the terms of the fee contract, appellee, by its agreement with Speicher, obligated itself to pay appellant a sum equal to that paid Speicher. If, as appellee contends, appellant is entitled only to the sum of $182.50, the total amount of the settlement was $547.50, of which appellant would receive one-third instead of one-half, and he would thus be compelled to submit to a change of his contract by appellee and Speicher without his consent. Having obligated itself, as a part of its agreement of settlement, to pay the fee of appellant, appellee became bound to pay him a sum equal to that paid Speicher."

While the court, in the case cited, said, "Had this agreement named a specific sum to be paid as fees there would be no difficulty whatever in arriving at the exact amount due appellant," the statement of the sum which appellant in the case at bar agreed to pay to appellees, would make no difference, for it was not merely an agreement to pay the appellees a sum of money, but was, as we have seen, an agreement to discharge their client's obligation, and leave in her hands $2,700, clear of any claim by them.

As we are, therefore, of the opinion that the findings of the trial court are in harmony with the law as laid down by the Supreme Court, the judgment will be affirmed.

AFFIRMED.

"The attorney on the brief of appellee is not the same attorney who filed a brief on behalf of the appellant for the motion for continuance. The court, at page 6241

> "The attorney on the brief of appellee is not the same attorney who filed a brief on behalf of the appellant for the motion for continuance for the reason that appellant was in default of appearance, and under his contract with his attorney was obligated to pay a fee only if appellant was successful in the case. Having gotten the case out of default, appellee, by his agreement with his attorney, obligated himself to pay appellant's attorney a fee for services rendered in the appeal. It is apparent that appellee's attorney would be entitled to no fee unless appellee was successful in the appeal

403 - 21390.

D. L. TARJAN, Appellee,	)	APPEAL FROM
vs.	)	COUNTY COURT,
WILLIAM C. REGELIN, Appellant.	)	COOK COUNTY.

202 I.A. 320

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment against him for $467.50, entered in the County Court of Cook County, and to have this court enter final judgment here for $155.00, which he claims is the correct amount due appellee. In his declaration, appellee stated that he had been hired by appellant to solicit subscriptions to the capital stock of a bank then being organized, that he was to be paid for that service at the rate of $2.50 a share, and that he obtained subscriptions for 209 shares; he further set out that he was entitled to $100.00 for services in placing a loan of $20,000.

Appellant contends that the testimony conclusively shows that the amount of compensation agreed upon was $1.00 a share, that certain of the subscriptions relied upon by appellee were obtained by appellant and others, that certain other of the subscriptions were obtained outside of the vicinity of the bank, and that it was expressly agreed that appellee should be paid only for subscriptions obtained in the vicinity of the bank.

Upon these questions the evidence was conflicting and contradictory, and while it is true that it is the right and duty of this court to reverse a judgment when it is not supported by the evidence, nevertheless, the evidence offered on behalf of appellee was sufficient to support the judgment entered, and upon a careful examination of the record, we are unable to say that the judgment is contrary

to the manifest weight of the evidence. In such circumstances, the uniform rulings of the Supreme and Appellate Courts of this State require that a judgment shall not be disturbed. The judgment of the County Court is affirmed.

AFFIRMED.

55 - 21429

F. A. MORRIS,
For use of Ottis Benedict, Lillian Braham and Earl Benedict doing business as The Benedict Type-setting Company, for use of Kilgore Linotype Company, a corporation,

Defendants in Error,

vs.

HANKEL PRINTING COMPANY,
A Corporation,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 331

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 1, 1914, the Kilgore Linotype Company, a corporation, began suit in the Municipal Court against Hankel Printing Co., a corporation, (hereinafter called the defendant) for the sum of $202.00. On March 9, 1914, the case was tried before the court without a jury and judgment entered against the defendant for the sum of $74.45 and costs; and the case now comes here on a writ of error sued out by the defendant.

The suit was originally begun by the Kilgore Linotype Company, a corporation, against the Hankel Printing Company, a corporation. Amendments were made from time to time so that at the time of the trial the title of the plaintiff was "F. S. Morris, for use of Ottis Benedict, Lillian Braham and Earl Benedict, doing business as the Benedict Type-setting Company for use of Kilgore Linotype Company, a corporation."

T. C. MURRAY,
For use of Office Executive, Printing
Trades Job Shop Executive Union Mem-
ibers in the Executive Type-writing
Company, for use of Alligator Literature
Company, a corporation,

Defendants in Error,

vs.

MARTIN PATRICIO CHAVEZ,
A Corporation,

Plaintiff in Error.

2052 I.A. 331

ED. DUNCAN CAUSE entitled the opinion of

the court.

On August 1, 1914, the Alligator Literature Company
a corporation, began suit in the Municipal Court against
Samuel Fleming Co., a corporation, (hereinafter called
the defendant) for the sum of $202.00. On March 9, 1914,
the case was tried before the court without a jury and
judgment entered against the defendant for the sum of
$94.67 and costs; and the case now comes here on a writ
of error duly to the defendant.

The main and principal reason by the Alligator
Literature Company, a corporation, against the Municipal Print-
ing Company, a corporation. Defendants were made from
time to time as time of the trial the title
of the plaintiff was it. C. Murray, for use of Office Execu-
tive, Printing Trades Job Shop Executive, during business re-
cess, Printing Trades Job Shop Executive, during business
hours in the Executive Type-writing
Company, for use of Alligator Literature
Company, a corporation.

Defendants in Error,

CAUSE TO

MUNICIPAL COURT

OF OKLAHOMA.

The final statement of claim made by the plaintiff January 30, 1915, alleges:

> "***that its claim is for the value of two thousand and twenty (2020) pounds of linotype metal owned by the Kilgore Linotype Company at ten (10) cents per pound, to-wit; $202.00; delivered to defendant by F. S. Morris, and Ottis Benedict, Lillian Braham and Earl Benedict, doing business as the Benedict Type-setting Company, which book account and the right to sue for said metal represented thereby, were acquired by the said Kilgore Linotype Company previous to the commencement of its suit, to-wit; a balance of 2140½ pounds which was acquired from the said F. S. Morris, and all of the amounts represented by the itemized statement attached to plaintiff's statement of claim beginning February 1st, metal 27½ pounds, and ending on or about January 1st, 1914, 55 pounds, which were delivered to defendant by Benedict Typesetting Company, and all right to sue for the said metal and the book account representing said metal was transferred to the said Kilgore Linotype Company previous to the commencement of suit; that said linotype metal was delivered to the defendant* upon certain dates and in certain amounts, and that only certain portions thereof were returned or paid for by the defendant."

Attached to the statement of claim is an itemized statement purporting to show the receipt by the defendant of 7433 pounds of metal and an accounting for 5413 pounds of metal, leaving a balance of 2020 pounds, for which the plaintiff claims $202, being at the rate of 10¢ per pound.

On March 9, 1915, the defendant filed an affidavit of merits in which it claims:

> "* * * that the nature of defendant's defense is that as to the balance set out as of February 1st, 1915, and as to all the metal belonging to F. S. Morris, the same was fully paid and settled and satisfied to F. S. Morris, before the institution of this suit without any notice that the Benedict Type-setting Company or the Kilgore Linotype Company had any right, title or interest in the before mentioned metal, or any part thereof; denies that the Kilgore Linotype Company owned any metal in the possession of the defendant; denies that the book account before referred to, and the right to

The final statement of claims made by the plaintiff
January 20, 1913, alleges:

. . . . . .

. . . . . "payment its claim to the title to the value of the
thousand one hundred (1000) shares of Liberty
metal owned by the Allegro Industrie Company of
one [10] cents per share, to-wit; $100.00; de-
livered to defendant by P. C. Morris, who cite
immunity, all the rights and real ownership, ac-
tual ownership as the Imperial Cigar-rolling com-
pany, which bore ownership and the right to use
for said metal registered thereby, were acquir-
ed by the said Allegro Industrie Company prevalue
to the commencement of its suit, to-wit; a balance
of eighty pounds which was deducted from the sale
P. C. Morris, and all of the accounts interested
by the finished statement attached to plaintiff's
statement of claim beginning February 1st, ending
Oct. pounds, and ending on or about January 1st,
1913, by reason, which was delivered to defen-
dant by Imperial Industrie Company, and all
right to use for the said metal and the best
accounts representing said metal was transferred
to the said Allegro Industrie Company previous
to the commencement of suit; that said Industrie
metal was delivered to the defendant upon cer-
tain terms with is certain ambiguity, and that only
certain portions thereof were received or paid
for by the defendant."

. . . . . attached to the statement of claim is an itemized
statement determining to that the receipts by the co[illegible]
of 1912 pounds or metal and an accounting for 1913 pounds
of metal, leaving a balance of 8000 pounds, for which the
physically eighty [80], being at the rate of 10¢ per pound

On March 6, 1913, the defendants filed an affidav
of merits in which it states:

. . . . . as a part thereof that the matters
alleged in said as to the matters set out
as of February 1st, 1913, and as to all the
metal ingredient in P. C. Morris, the same
was fully paid and settled and satisfied
by P. C. Morris, before the institution
of this suit; that allegro say matter that the
Imperial Cigar-rolling Company or the Lib-
erty Industrie Company and not right, title
or interest in the before mentioned metal,
or any part thereof; denies that the filgers
Industrie Company owns any metal in the pres-
ence of the defendant; denies that the pur-
chased Industrie Company, has the right to

sue for said metal represented thereby were acquired by the said Kilgore Linotype Company, previous to the commencement of this suit, from F. S. Morris or the Benedict Typesetting Company; avers that the defendant has paid for all metal ever sold and delivered to it by the said Benedict Typesetting Company; denies that prior to the bringing of suit plaintiff acquired all right, title and interest whatsoever in and to said claim, as alleged in amended statement of claim."

Prior to the first day of February, 1913, Morris was engaged in the linotype composition business and the owner of certain linotype machines and certain other personal property including a large amount of linotype metal, the greater part of which metal was in the possession of his various customers. On January 31, 1913, the defendant, Hankel Printing Company, had in its possession 2140½ pounds of linotype metal which was admittedly the property of Morris and which was worth (it is admitted) 10¢ per pound, or $214.05. On January 31, 1913, Morris entered into a written lease with C. M. Benedict, leasing to the latter from January 31, 1913 to January 31,1914, two linotype machines and certain other personal property pertaining to a linotype type-setting shop, for which the lessee, Benedict agreed to pay $1,200 at the rate of $100 per month. The lease provided, among other things, that the lessee Benedict, "pay rent, gas, power, light, telephone bills and all operating expenses" and "pay all bills contracted in the name of F. S. Morris, monthly. Party of the first part (F. S. Morris) is to collect all outstanding bills and pay all expenses up to the date of this instrument."

The lease also provided that the lessee Benedict should return the machines in as good condition as found; the same number of pounds of linotype metal (as shown by receipt held by said first party of this date) and should

[illegible] the said Bonds [illegible]
[illegible] Company,
[illegible] of this suit,
Item 2. G. Morris as President [illegible]
Company; [illegible] dated [illegible] paid
for all notes [illegible] delivered to it
by the said Imperial Typewriting Company;
denies that prior to the bringing of this
plaintiff [illegible] all right, title and in-
terest whatsoever in and to said Bonds, or
[illegible] to [illegible] of plaintiff.*

Prior to the first day of February, 1913, Morris was employed in the Illinois corporation business and the owner of certain Illinois business and certain other personal property including a large amount of literary matter, the literary part of which Ernest was in the possession of via various contracts. On January 31, 1913, the defendant Imperial Writing Company, then in its possession first owned of literature which was admittedly the property of Morris and which was (it is admitted) [illegible] or $2[illegible]. On January 1, 1913, Morris entered into a written lease with G. E. Benedict, leasing to the latter from January 30, 1913 to January 31,1914, the Illinois [illegible] and certain other personal property pertaining to a literary type-writing shop, for which the lessee, Benedict agreed to pay $1,200 at the rate of $100 per month. The lease provided, among other things, that the lessee Benedict, "but real, not, power, light, [illegible] privi[illegible] to all operating expenses" and "pay all bills contracted in the name of J. G. Morris, monthly. Early of the first month (J. G. Morris) is to collect all outstanding bills and pay all expenses as in the case of this instrument."

The lease also provided that the lessee Benedict [illegible] [illegible] [illegible]

return all fonts and matrices and all other equipment "as shown by the inventory to be or have been leased to him by this instrument at the end of the term in as good condition as found, ordinary wear and tear excepted."

Benedict, who subsequently organized the Kilgore Linotype Company, took over the business of Morris on February 1, 1913. The new company did business with many of the former customers of Morris, among them the defendant, Hankel Printing Company.

At the time Morris made the lease, February 1, 1913, the defendant, Hankel Printing Company owed him 2140½ poinds of metal. When the change was made and the lease took effect and Benedict stepped in and took charge of the new business, the metal balances, including that of 2140½ poinds above referred to, were transferred to the Benedict books. The witness Braham, who was originally the bookkeeper for Morris and subsequently became interested in the business as one of the partners of the Benedict Type-setting Company and then later interested in the Kilgore Linotype Company, testified that she transferred to the Benedict books all the outstanding metal that was not paid for "that is all the printers were expected to return or pay for if they did not return it". It was the custom to allow the printer to either return the metal or keep it and pay for it at the rate of 10¢ per pound. The books that were kept were rather primitive and did not contain much more than the accounts receivable and simple debits and credits. There is an obvious conflict in the testimony as to what notice, if any, the defendant, Hankel Printing Company, had of the transfer of the metal accounts by Morris to Benedict. Benedict claimed that he had a conversation

anything we could, certainly more than enough to
give my time impartially to be at home here ignored to
censure all those who neither contributed
to the Democratic Committee, nor did any other political
work for it at the time of its most pressing. The people
were then told that a vote for Bryant or Bush is
or bad for it that did not endorse it". It was the custom
party (by "that" all the principles were expected to submit
the Democratic people all the entertaining moment that was not
Democratic Committee and then later interested to the
to the business as one of the partners of the Democratic
the possibility for unity and understanding between the
Democratic people. The witness thinks, she was originally
Democratic party relations to, more transferred to the
of the one business, the moral Reformer, implying that of
Jones just after and Democrat standing in and took charge
State people of next). When the change was made the
State Democratic Committee, the election, 1912, the
the former secretary of State, among them the Democratic
Democratic Principle Committee.

At the time Harris took the lease, February 1,
1912, the new committee did maintain with many of
Democratic principles, only case the business of Doctrin as Jeffer-
son, 1, 1912. The new committee did maintain with many of
Democratic principles, only case the business of Doctrin as Jeffer-
son, 1, 1912. The new committee did maintain with many of
Democratic principles, only case the business of Doctrin as Jeffer-
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son, 1, 1912. The new committee did maintain with many of
Democratic principles, only case the business of Doctrin as Jeffer-
son, 1, 1912. The new committee did maintain with many of
Democratic principles, only case the business of Doctrin as Jeffer-

with Hankel of the defendant company, in which the latter said that he understood that Benedict had taken over the Morris plant. On the other hand, Hankel of the defendant company testified, that he undertsood that Morris and Benedict were working together in one company; that he did not know anything about their dealings; that he knew Benedict as manager for Morris, but the first time he knew Benedict made any claim against the defendant was in the year 1914; that he received metal statements from time to time during the year 1913; that they were always on the stationery of Morris.

The defendant produced a statement on the stationery of Benedict Type-setting Company, dated Chicago, July 1, 1914, addressed to Hankel Printing Company, under date of January 8th, containing a charge for composition amounting to $6.50, which it had paid.

The telephone on the premises remained in the name of Morris until after the first of October, 1913. About September, 1913, some trouble arose between Morris and Benedict over their relations in regard to the place and the property involved. Morris testified that he never authorized Benedict to collect the metal in the possession of the defendant. At the time the linotype machines were turned back to Morris, Benedict refused to turn any metal over to him. There was evidently a disagreement between Morris and Benedict in regard to the metal that was in the shop and the metal in the hands of Morris' customers on February 1, 1913. Benedict had never given Morris any receipt for any of the metal, although when he took possession of the shop there was 1008 pounds of metal there at that time. The linotype machines were turned back to Morris by Benedict sometime in

October, 1913 and Morris started up in business again. Morris evidently knew that the bookkeeper was going to transfer the metal balances from his book to another book and that the metal accounts were going to be carried along by Benedict in his business. It was the understanding that Morris might have a position with Benedict and work for him if he desired to do so.

Sometime in October, 1913, after Morris got his machines back, he went to Hankel of the defendant company and made a settlement with him for the metal which the defendant had in its possession, which was something like 1700 pounds. The lease with Benedict had been terminated sometime in September, 1913.

There is obvious conflict in the testimony. The lease does not help the position of the plaintiff. It in fact charges the plaintiff with 1008 pounds of metal. The words in the lease as to wear and tear do not in our judgment apply to the consumption and loss of metal by remelting and use. Upon the execution of the lease the title to the 2140½ pounds of metal, worth 10 cents a pound, was in Morris. The plaintiff claims it by reason of the lease and the consent of Morris and the defendant. The defendant claims the lease does not in any way pass title to the leasee, that is, either to the metal or to the account, and that itnever had any notice of a transfer of the right to the metal or to the account from Morris to Benedict.

The important question to be considered is whether the defendant had notice that the metal account had been transferred to the plaintiff. If the defendant did not have sufficient notice then the settlement he made with Morris

October, 1912 and Morris agreed to go immediately.

Morris evidently knew that the Manufacturer was going to
transfer the metal interests from the bank to another bank
and that the metal accounts were going to be carried along
by Benedict in his business. It was the understanding that
Morris might have a position with Benedict and work for him
if he desired to do so.

Sometime in October, 1912, after Morris got his
examinee check, he went to Detroit of the defendant company
and made a settlement with him for the metal which the
defendant had in its possession, which was something like
1710 pounds. The lease with Benedict had been terminated
sometime in September, 1912.

There is strong conflict in the testimony. The
jury does not help the position of the plaintiff. It is in
fact charged the plaintiff with 1000 pounds of metal. The
words in the lease as to wear and tear do not in our judg-
ment apply to the consumption and loss of metal by reasoning
and use. Upon the execution of the lease the title to the
1800 pounds of metal, worth 10 cents a pound, was in Morris.
The plaintiff claims it by reason of the lease and the agre-
ment of Morris and the defendant. The defendant claims the
lease does not in any way pass title to the lessee, that it
either to the world or to the account, and that Morris had
any notice of a transfer of the right to the metal or to the
account from Morris to Benedict.

The important question to be considered is whether
the agreement and notice that the metal account had been
transferred to the plaintiff. If the defendant did not have
sufficient notice that the settlement be made with Morris

relieves it from further responsibility. The burden of proving that notice is upon the plaintiff. We are of the opinion that the plaintiff has not sufficiently proven that the defendant had notice of an alleged transfer of the right to the metal or to the account from Morris to Benedict.

The judgment must be reversed and the cause dismissed.

JUDGMENT REVERSED
AND CAUSE DISMISSED.

relieves it from further responsibility. The burden of proving that action is upon the plaintiff. We are of the opinion that the plaintiff has not sufficiently proven that the defendant has certain of its alleged breaches of the right to the award or to the amount from which he demands.

The judgment must be reversed and the cause dismissed.

ACT GRANTED DENIED.

91 - 21479

C. W. COCHRAN LUMBER CO.,
A Corporation,
Defendant in Error,

vs.

CONSOLIDATED ADJUSTMENT CO.,
A Corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 333

MR. JUSTICE TAYLOR delivered the opinion of the court.

In an action of contract in the Municipal Court the C. W. Cochran Lumber Co., a corporation, (hereinafter called the defendant) recovered judgment against the Consolidated Adjustment Company, a corporation, (hereinafter called the plaintiff) for $346.96 and costs of suit, to reverse which the defendant prosecutes this writ of error. In the lower court the case was submitted to the court for trial without a jury.

The part of the contract which is in writing, and which is signed by the defendant alone, is as follows:

"This certifies that C. W. Cochran Lumber Co., client, of Meridian, Miss. has paid to the Consolidated Adjustment Company, of Chicago, $98.64 for which, together with commissions according to commission rates printed below, to be paid by said client, the Consolidated Adjustment Company agrees to give to said client a three years' service from the date hereof, in the prosecution and adjustment of claims aggregating $2157.37, to be listed for adjustment under terms of this contract.

GUARANTY.

The Consolidated Adjustment Company guarantees that it will recover in cash, or secured net settlement, from the claims of said client at least $502.23, or to refund the full initial fee paid, reserving the right to cancel the contract, refund said initial fee and surrender all claims listed hereunder at any time within six months from date; or will continue the ser-

C. W. COCHRAN LUMBER CO.,
A Corporation,
Defendant in Error,

vs.

COMMERCIAL ADJUSTMENT CO.,
A Corporation,
Plaintiff in Error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

In an action of contract in the Municipal Court of the C. W. Cochran Lumber Co., a corporation, (hereinafter called the defendant) recovered judgment against the Commercial Adjustment Company, a corporation, (hereinafter called the plaintiff) for $346.96 and costs of suit, to reverse which the defendant prosecutes this writ of error. In the lower court the cause was submitted to the court for trial without a jury.

A part of the contract which is in writing, and which is signed by the defendant alone, is as follows:

"This certifies that C. W. Cochran Lumber Co., client, of Carthage, Miss. has paid to the Commercial Adjustment Company, of Chicago, $99.64 for which, together with commissions according to contract rates printed below, to be paid by said client, the Commercial Adjustment Company agrees to give to said client a three years' service from the date hereof, in the prosecution and adjustment of claims aggregating $347.37, to be listed for adjustment under terms of this contract.

SCHEDULE.

The Commercial Adjustment Company guarantees that it will recover in suit, or secured net settlement, from the claims of said client at least $202.[illegible] or to refund the full initial fee paid, receiving [illegible] right to cancel the contract, refund said initial fee and surrender all claims listed hereunder at any time within six months from date, on [illegible]

vice under this contract beyond the term above mentioned and until the minimum salvage amount, hereinafter estimated, shall have been so recovered, without additional compensation except commissions, as hereinafter specified, on adjustments effected.

Aggregate amount of claims contracted for.....$2157.37
Minimum salvage amount estimated on said claims..... 1004.46
Amount of guaranty..... 502.23 net

Judgm'ts_____Bonds_____Claims in Acc'ts_____Notes_____Controversy) } Total $_____

(Classification of claims necessary only when loan is desired.)

Lost Debtor Claims_____Bankrupt and Outlawed Claims } Total.....

(No Guaranty on this class of claims)

COMMISSION RATES:

On adjustment of over $100.....10 per cent.
On adjustment of over $25 to $100 inclusive....15 per cent.
On adjustments of $25 or less.....25 per cent.
On current claims not exceeding 12 months past due..... 7 per cent.
(Minimum fee 50 cents)

The Consolidated Adjustment Company further agrees at all times to confine its process within the limits of the law, and the said client agrees to immediately report all payments and to promptly remit commissions thereon.

Received of C. W. Cochran Lumber Company Ninety eight & 64/100 Dollars, as payment in full on a full three year $2157.37 contract, from November 3rd, 1910 to November 3rd, 1913.

CONSOLIDATED ADJUSTMENT COMPANY,

By Chas. F. Perkins.

Dated November 3rd, 1910."

Plaintiff admitted that the defendant had collected on the claims in question $172.52 and that the defendant had turned over to the plaintiff, after deducting the defendant's commission of $17.25, the sum of $155.27. The difference between $502.23, the amount of the guaranty mentioned in the

value under this contract beyond the term above mentioned and until the claims salvage amount, hereinafter mentioned, shall have been so recovered, without additional compensation except commissions, as hereinafter specified, on adjustments effected.

Aggregate amount of claims contracted for.....$217.
Minimum salvage amount anticipated on said claims.....10%.
Amount of guaranty.....$50.

Judgm'ts_____Bonds_____Claims in Suit } Total $_____
Acc'ts_____Notes_____Controversy)

(Classification of claims necessary only when loans are desired.)

Loss Debtor Bankrupt and Claims_____Outlawed Claims } Total.....

(No Guaranty on this class of claims)

COMMISSION RATES:

On adjustment of over $100.....10 per
On adjustment of over $25 to $100 inclusive....15 per
On adjustment of $25 or less.....25 per
On current claims not exceeding 12 months past due..... 7 per
(Minimum fee 50 cents)

The Commercial Adjusting Company further agrees at all times to confine its process within the limits of the law, and the said client agrees to immediately report all payments and to promptly remit commissions thereon.

Received of C. W. Goodrum Lumber Company Ninety eight & 64/100 Dollars, on payment in full on a full three year $217.37 contract, from November 3rd, 1910 to November 3rd, 1913.

COMMERCIAL ADJUSTING COMPANY

By Chas. F. Perkins.

Dated November 3rd, 1910."

Plaintiff admitted that the defendant had collected on the claims in question $172.82 and that the defendant had turned over to the plaintiff, after deducting the defendant's commission of $17.85, the sum of $154.97. The difference between $200.43, the amount of the quarterly mentioned in the

writing signed by the defendant and $155.27, the net amount received by the plaintiff, is the amount for which the judgment was entered, that is $346.96.

On October 1, 1913, almost three years after the date of the contract, the defendant wrote to the plaintiff the following letter in part as follows:

"In our prosecution of the claims you have submitted for our service under a certain printed form of contract, we find that we will not be able to realize the full amount stipulated on the claims filed to date. This is due to the fact that some of the claims filed with us were against persons who were not to be found at nor traced from the addresses given us; others outlawed or discharged in bankruptcy.

"We, therefore, inform you of our election to continue to give you our services as collectors beyond the three year period mentioned in the contract, and in accordance with its terms our service will be employed in your behalf, without additional costs except commissions on moneys collected for you. XXX

~~"This gives you the right to command our services as collectors on any and all business you may submit until the amount specified in the contract is realized. Had the claims you have already filed with us been of the character and nature contemplated by the contract, undoubtedly we would have, ere this, realized the amount proposed.~~

"You, of course, have other past due claims deserving of our attention, which we urge you to forward. Our agreement with you, in the form of a printed contract, provides for our service upon your entire collection business without additional costs to you except commissions on moneys actually collected. Then submit such business that we may be given every opportunity of as speedily as possible maturing our contract with you of recovering from correct and justly due claims against persons of correct addresses ~~the amount the contract provides for.~~"

The writings above set forth and the admissions as to the amounts paid and received, and a written statement of the claims, constitute all the evidence in the case. The record, however, shows that the defendant offered to prove that a report was made to the plaintiff that the correct addresses of five of the debtors, against whom were claims aggregating $1557.84, could not be found.

"In our prosecution of the claims you have submitted for our service under a certain printed form of contract, we find that we will not be able to realize the full amount stipulated on the claims filed to date. This is due to the fact that some of the claims filed with us against persons who were not to be found at nor traced from the addresses given us; others outlawed or discharged in bankruptcy.

"We, therefore, inform you of our election to continue to give you our services as collectors beyond the three year period mentioned in the contract, and in accordance with its terms our service will be employed in your behalf, without additional costs except collections on moneys collected for you. x x x

~~"Upon return to us by mail to our account our services on collections on any and all business you may submit until the amount specified in the contract is realized. And the claims you have already filed with us been of the character and nature contemplated by the contract, undoubtedly we would have, ere this, realized the amount proposed.~~

"You, of course, have other past due claims deserving of our attention, which we urge you to forward. Our agreement with you, in the form of a printed contract, provides for our service upon your entire collection business without additional costs to you except commissions on moneys actually collected. Then submit such business that we may be given every opportunity of so speedily as possible securing our contract with you of recovering from correct addresses the claims against persons of correct address ~~to whom the contract provides for.~~"

The writings above set forth and the admissions as to the amounts paid and received, and a written statement of the claims, constitute all the evidence in the case. The record, however, shows that the defendant offered to prove that a report was made to the plaintiff that the correct addresses of five of the debtors, against whom were claims aggregating $1007.04, could not be found.

It is contended by the defendant that the plaintiff was bound as a condition precedent to recovery to prove that the claims furnished for collection were neither outlawed nor settled by bankruptcy, nor against lost debtors. The contract in this case is a unilateral contract. When the plaintiff delivered the $2157.37 of claims to the defendant for collection and paid, as he did, the sum of $93.64, he had performed in full all obligations upon him. There then remained outstanding the promise of the defendant as evidenced by the writing which was signed by the defendant. The writing is not a contract, as some of the courts have erroneously called it, it only contains the promise of the defendant and a receipt for money paid by the plaintiff. It follows, therefore, that if the defendant wishes to take advantage of any qualifications or limitations as set forth in the written expression of its obligations, the defendant must itself affirmatively offer evidence to that effect; in other words, when the defendant claims that its guaranty is limited the burden of introducing evidence to that effect, is not on the plaintiff but on the defendant.

It is further contended by the defendant that bankrupt, outlawed and lost debtor claims are expressly excluded from the guaranty sued on, and that the lower court erred in ruling that evidence on that subject as to the claims aggregating $2157.37 was immaterial.

The obligations of the defendant which arose by reason of the writing of December 3, 1910, are substantially as follows:

First, the defendant promises the plaintiff three

years' collection service in the prosecution and adjustment of claims aggregating $2157.37;

Second, the defendant promises to pay to the plaintiff at least $502.23, or refund the full initial fee paid, or cancel the contract and refund the said fee within six months from date or continue the service after the expiration of the three years and until $1004.46 has been recovered.

The written obligation of the defendant is somewhat different from that in Mound City Dis. Co. v. Con.Adj. Co. 152 Ill. App. 155.

The aggregate amount of claims in the instant case, is especially set forth as $2157.37, and the amount the defendant guarantees is specified twice, as $502.23. The second time it is mentioned it is written, "amount of guaranty $502.23 net", and this appears in the writing some lines earlier than the expression, "(No guaranty on this class of claims)". The defendant offered no proof in explanation of the word "guaranty", and the writing in no way shows how the sum of "502.23 net" was computed. If the blanks had been filled out there would then have been some basis for a computation, but they were not and the parties are affected only by what the writing contains. Bearing in mind, therefore, the affirmative promises expressed in dollars and cents, and that that part of the writing which seems to undertake to qualify the general guaranty, contains no amounts but is left blank; and that the writing does not explain how the amount $502.23 was computed; it seems only reasonable to conclude that the writing does not bear out the contention of the defendant;

Jones' conviction pursuant to the prosecution and adjustment of claims aggregating $417.37;

Second, the defendant promises to pay to the plaintiff at least $825.00, or return the full initial fee paid, or cancel the contract and refund the paid fee within six months from date or continue the service after the expiration of the three years and until $1004.46 has been recovered.

The written obligation of the defendant is somewhat different from that in Second City Ins. Co. v. Cen. Ass. Co. 182 Ill. App. 182.

The aggregate amount of claims in the instant case, is especially set forth as $417.37, and the amount the defendant guarantees is specified twice, as $825.00. The second time it is mentioned it is written, "amount of guaranty $825.00 net", and this appears in the writing in explanation of the word "guaranty", and the writing in no way shows how the sum of "$825.00 net" was computed. It does seem that the filled one there would then have been some basis for a computation, but they were not and the parties are affected only by what the writing contains. Bearing in mind, therefore, the affirmative promises expressed in bullets one ninth, and that that part of the writing which seems to undertake to qualify the general warranty, contains no amounts but is left blank; and that the writing does not explain how the amount $825.00 was computed; it seems only reasonable to conclude that the writing does not express the complete obligation of the defendant;

but supports the ruling of the trial judge that the defendant was not entitled to introduce evidence to show that any part of the guaranteed amount of $502.23, has failed.

Finding no error in the record which justifies a reversal of the judgment, it is affirmed.

AFFIRMED.

but supports the ruling of the trial judge that the defendant was not entitled to introduce evidence to show that any part of the guaranteed amount of $600.00 has failed.

Finding no error in the record which justifies a reversal of the judgment, it is affirmed.

AFFIRMED.

459 - 21857

2270

BERNHARD SCHIPERSKY and ROMAN SCHIPERSKY,
Appellants,

vs.

GUSTAV GARTNER et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

202 I.A. 337
-02 I.A. 337

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants filed a bill to foreclose a trust deed executed by the Gartners to secure their principal and interest notes made payable to Rosie Aronowski, the mother of complainants. The bill set up the endorsement and transfer of said notes by her to them, just before her death, default in payment of the second interest note, and their election under a provision of the deed to declare the principal sum due.

The Gartners answered averring readiness at all times to pay the said interest note but that they did not know, under circumstances set forth in the answer, to whom to pay it, and tendered the amount in court. Later Michael Aronowski, the surviving husband of Rosie, and step-father of complainants, an old man about eighty-three years of age, filed an intervening petition claiming on the facts therein alleged, to be the legal owner of said notes.

The issues being duly formed, the cause was referred to a master who found in accordance with the averments of the intervening petition and the answer of the Gartners. Exceptions to the report were overruled and a decree entered approving the same, ordering dismissal of the bill for want of equity, canceling and holding for naught the assignment

Appellants,

vs.

Appellees.

Appellants filed a bill to foreclose a trust deed executed by the defendants to secure their principal and interest notes then owned, the notes bearing 7 per cent interest. The bill set up the enforcement and character of said notes by law to them, that before maturity, namely on March 1, 1894, default was made in the payment of the interest then due, and that by reason thereof the principal sum became due.

The defendants answered severally admitting all the allegations of the bill except as to the amount due, to which they did not know, under circumstances set forth in the answer, to whom to pay it, and tendered the amount in court. Major Bidwell, deceased, the surviving partner of Smith, and Step-Father of complainant, an old man about eighty-three years of age, filed an intervening petition claiming on the facts therein alleged, to be the legal owner of said notes.

The issues being duly formed, the cause was referred to a master who found in accordance with the averments of the intervening petition and the answer of the defendants. Objections to the report were overruled and a decree entered approving the same, ordering dismissed of the bill for want

2052 I.A. 337
2052 I.A. 337

and transfer of the notes by Rosie to complainants, declaring Michael Aronowski to be the legal and equitable owner of said notes and ordering complainants to transfer and deliver them to him. The appeal is from that decree.

Most of the argument of appellants relates to the sufficiency of the evidence which we have carefully reviewed. It covered among other matters the transactions pertaining to the loan and execution of the papers, admissions made by Rosie Aronowski to third parties bearing on the source and ownership of the money loaned, prior transactions by which its source was traced to the possession and ownership of Michael Aronowski, and the financial circumstances of each at the time of their marriage and up to the time of the loan. At points the testimony was conflicting and contradictory, and required the master to pass on the credibility of the witnesses, and we cannot say that his findings of fact were not correct. Following the general rule, his findings will not be reversed unless clearly and palpably contrary to the weight of the testimony.

Nor need we consider the objections made that the testimony of Aronowski was inadmissible, which were sustained by the master as to communications and transactions with his wife during her life and which he reported he did not consider in reaching his conclusions. Excluding such testimony we find sufficient evidence in the record to warrant the master's conclusions and the findings in the decree.

In their printed argument counsel for appellants state that they do not desire to discuss the conclusions as to legal and equitable rights, but that "their great objection to the report and the decree is that it is not warranted by the evidence." For the reasons above stated we shall not discuss the evidence, and reaching the conclusion that the findings in favor of the intervening petitioner were justified

and that complainants had no legal right to the notes by which they could maintain the bill, we need not consider the merits of the defense made by the Gartners. No question arises here between them and the intervening petitioner. We think the bill was properly dismissed for want of equity and that the decree should be affirmed.

AFFIRMED.

and that conclusion is that no legal right to the notes by
which they could maintain the bill, we need not consider
the merits of the defense made by the Garrisons. To question
arises here between them and the intervening petitioner.
We think the bill was properly dismissed for want of equity
and that the decree should be affirmed.

AFFIRMED.

549 - 21947

EARL STEWARD and FRED STEWARD,
Appellees,

vs.

JACOB WEISENMAYER et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

202 I.A. 338

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only contention on this appeal is that the court should not have directed the verdict for plaintiffs. The suit was on a promissory note. Defendants were the makers and plaintiffs the payees. The defense was want of consideration. The controlling facts were undisputed and there was no evidence fairly tending to show anything to support the defense.

The evidence showed that plaintiffs and two others were the officers of a corporation, and comprised its board of directors and all of its stockholders; that the corporation owned a patent and duly executed an assignment of it to four persons, three of whom were makers of said note; that the consideration named was $15,000 of which $5000 was paid at the time of the assignment; that an understanding was reached between the directors as such at a regular meeting, (who comprised all the stockholders) that the balance of $10,000 should be divided between them according to their respective shareholdings, of which plaintiffs held two-thirds; that the note in question was given and taken for their pro rata interest with a clear understanding by all parties, including all

JACOB [illegible] and [illegible],

Appellees,

vs.

[illegible],

Appellants.

APPEAL FROM

[illegible]

OF CHICAGO.

[illegible] A. 338

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

The only contention on this appeal is that the court should not have directed the verdict for plaintiffs. The suit was on a promissory note. Defendants were the makers and plaintiffs the payees. The defense was want of consideration. The controlling facts were undisputed and there was no evidence fairly tending to show anything to support the defense.

The evidence showed that plaintiffs and two others were the officers of a corporation, and comprised the board of directors and all of its stockholders; that the corporation owned a patent and duly executed an assignment of it to four persons, three of whom were makers of said note; that the consideration named was $15,000 of which $5000 was paid at the time of the assignment; that an understanding was reached between the directors as such at a regular meeting, (who comprised all the stockholders) that the balance of $10,000 should be divided between them according to their respective shareholdings, of which plaintiffs held two-thirds; that the note in question was given and taken for their pro rata interest [illegible]

the stockholders aforesaid and the makers of the note, that it was in part payment of such consideration.

Under such a state of facts we do not think the consideration of the note could be questioned, or that a second recovery therefor could be had by the corporation.

Some of the makers of the note were not direct beneficiaries of the assignment, but it is not necessary that the consideration should have passed to them from the payees of the note. If there was a valuable consideration passing to them from the other makers or any one else by reason of which they executed the note, that would be sufficient to sustain it. (Moore v. Hubbard, 42 N. E. 962; Farrow v. Turner, 2 A. K. Marshall (9 Ky. 495); Comm. Nat'l. Bank v. Kirkwood, 172 Ill. 568; Cobb v. Heron, 78 Ill. App. 658.)

No proof was adduced to show that a valuable consideration did not pass to each in some form by reason of which each signed the note.

We think a verdict was properly directed.

AFFIRMED.

the consideration aforesaid and the nature of the note,
that it was in part payment of such consideration.]

Under such a state of facts we do not think the consideration of the note could be questioned, or that a second recovery therefor could be had by the corporation. The name of the makers of the note were not dissimilar phonetically to the assignees, but it is not necessary that the consideration should have passed to them from the payee of the note. If there was a valuable consideration passing to them from the other makers or any one else by reason of which they executed the note, that would be sufficient to sustain it. (Warner v. Duffield, 42 N. Y. 363; Farrar v. Farrar, 6 N. H. Marshall (6 Ky. 409); Comm. Nat'l. Bank v. Kirkwood, 178 Ill. 348; Lehn v. Doron, 78 Ill. App. 656.)

To prove one planned to show that a valuable consideration did not pass to each in some form by reason of which each signed the note.

We think a verdict was properly directed.

AFFIRMED.

565 - 21963

MAX GOLDENBERG, Appellee,

vs.

E. A. MYERS, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

202 I.A. 340

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $2441.12 in a case tried without a jury, brought to recover rent and certain expenses provided for im a lease by the plaintiff, Goldberg. On the back of the lease was a written guaranty by the defendant (appellant) of the payment of the rent and performance of the covenants by the lessees, "upon condition", as therein expressly stated, "notice is to be given me in writing within ten (10) days after failure of lessees to comply with terms of lease."

Defendant pleaded several defenses only one of which need be considered, that of failure to give a written notice in compliance with the terms of the guaranty.

The term of the lease was from May 1, 1909 to April 30, 1913. The rent was payable on the first of each month in advance. The rent sued for accrued, and the expenses claimed were incurred, during the last year of said term. The evidence is somewhat uncertain whether the tenants who defaulted in payment of rent, as claimed, on May 1, 1912, held under the lease in question or another one. But in the view we take of the case that need not be considered. For, if the guaranty was still in force on May 1, 1912, a strict construction thereof, which the guarantor can invoke,

Ref. Secretary,

re. Estate,

Property.

Address Given

Effective Date

Of Closing.

2021.340

re. Proposed Sterling Street Extension and Widening of Jackson

This agreement is from a judgment for $2347.12 in a case tried without a jury, brought to recover rent and occupancy payments provided for in a lease by the plaintiff, landlord. On the date of the lease was a written guaranty by one Gerondelis (Gerolimis) of the payment of the rent and performance of the covenants by the lessee, "upon condition," on certain explicitly stated, "notice is to be given me in writing within ten (10) days after failure of lessee to comply with terms of lease."

Defendant already served returned only one of eight week event be considered, that of failure to give a written notice to commissioner with the terms of the guaranty.

The term of the lease was from July 1, 1908 to April 30, 1913. The rent was payable on the first of each month in advance. The rent was for December, and the advance payment was returned, during the last year of said term. The witness is somewhat uncertain whether the tenants who vacated in January or Feb. or sixteen, or July 1, 1911, paid under the lease in question or another one. But in the view we take of the case that need not be considered. For, if the guaranty was still in force on July 1, 1911, a notice

(Tolman Co. v. Rice, 164 Ill. 255) required service on Myers of a written notice of the default within ten days from May 1st. For there can be no question that the giving and receipt of such a notice was a condition precedent to liability on the guaranty and that without compliance therewith the guarantor was discharged, (Nat'l. Surety Co. v. Long, 125 Fed. Rep. 887; U. S. Fidelity & Guaranty Co. v. Rice, 148 id. 206; Tolman Co. v. Rice, supra) and of course the burden was on plaintiff to show such a service. This was not done. The notice or notices relied on consisted of monthly statements of rent due as it accrued, mailed to Myers at Peru, Indiana, as claimed by plaintiff's bookkeeper, sometime between the first and tenth days of each month But regardless of the uncertainty whether a notice mailed as late as the tenth of the month could have reached Myers within the ten days provided for, Myers testified that he received no such notices nor any other written notices between July, 1910 (when one unimportant to the issues here was received) and May 16, 1910, when a written notice dated May 15, 1912, was received, manifestly too late to comply with the condition of the guaranty.

Even if a statement of rent due could be deemed a notice of failure of the lessee to comply with the terms of the lease, yet proof of the mailing thereof was not sufficient. It devolved on plaintiff to prove a written notice was received within the ten days after such failure. There being no such proof in this case, and it appearing that there was such a failure of which the defendant was entitled to due written notice as a condition precedent to liability on the guaranty, he was discharged therefrom, and the trial court should have so found.

The court evidently took a different view of the

(Tolman Co. v. Vice, 164 Ill. 249) required service on Myers or a written notice of the default within ten days from May 1st. Nor there can be no question that the giving of such a notice was a condition precedent to liability on the guaranty and that without compliance therewith the guarantor was discharged. (Nat'l. Bk. of v. Long, 133 Fed. Rep. 847; U. S. Fidelity & Guaranty Co. v. Rice, 148 Id. 208; Tolman Co. v. Rice, supra) and of course the burden was on plaintiff to show such a service. This was not done. The notice or notices relied on consisted of monthly statements of rent due as it accrued, mailed to Myers at Peru, Indiana, as claimed by plaintiff's bookkeeper, sometime between the first and tenth days of each month. But regardless of the uncertainty whether a notice mailed on late in the month of the month could have reached Myers within the ten days provided for, Myers testified that he received no such notices nor any other written notices between July, 1910 (when one statement to the lessee here was received) and May 10, 1910, when a written notice dated May 10, 1910, was received, manifestly too late to comply with the condition of the guaranty.

Even if a statement of rent due could be deemed a notice of failure of the lessee to comply with the terms of the lease, yet proof of the mailing thereof was not sufficient. It involved on plaintiff to prove a written notice was received within the ten days after such failure. There being no such proof in the case, and it appearing that there was such a failure of which the defendant was notified to due written notice as a condition precedent to liability on the guaranty, he was discharged thereform, and the trial court should have so found.

The court evidently took a different view of the

law for it refused to hold "that the mere mailing of a notice is not sufficient to charge the defendant, but that such notice must be actually received." In this it erred. There was no attempt to prove the actual receipt of a written notice. The judgment must, therefore, be reversed, and judgment entered here, for on the undisputed facts pertaining to notice, an essential element of proof, there could be no recovery at law.

REVERSED.

motion must be mutually received." In this it erred. There was no attempt to prove the mutual receipt of a written motion. The judgment must, therefore, be reversed, and judgment entered here, for on the undisputed facts pertaining to motion, an essential element of proof, there could be no recovery at law.

Reversed.

596 - 21994

THE CHICAGO DAILY NEWS COMPANY, a corporation,
Appellee,

vs.

JACKSON & SEMMELMEYER, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

202 I.A. 341

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The points urged on this appeal are that the judgment is void and, if not, the court abused its discretion in refusing to vacate it.

Notice to place the cause on the short cause calendar was given to appellant and filed with the clerk, Friday, May 28, and the cause was heard and judgment entered against appellant, Tuesday, June 8, eleven days thereafter. The rule of court relating thereto designated Monday as the day of the week on which such cases are set for trial, and Thursday, eleven days before such Monday, as the day on which service of the notice to place on such calendar, shall be filed.

Claiming it was led to believe that because of the giving of such notice on Friday instead of Thursday the case would not be heard before Monday, June 14, appellant made a motion to vacate the judgment accompanied by an affidavit based on the foregoing facts. Plaintiff did not resist it and when the court suggested that it should be allowed, appellant, for some undisclosed reason, withdrew the motion, pursuant to which an order of the withdrawal

THE CHICAGO DAILY NEWS COMPANY, a corporation,

Appellee,

vs.

JACKSON & HARMONY, a corporation,

Appellant.

APPEAL FROM COOK COUNTY.

ABSTRACT CHART.

APPELLATE COURT 1921-A-341

MR. JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.

The points urged on this appeal are that the judgment is void and, if not, the court abused its discretion in refusing to vacate it.

Notice to place the cause on the short cause calendar was given to appellant and filed with the clerk, Friday, May 29, and the cause was heard and judgment entered upon appellant, Tuesday, June 8, eleven days thereafter. The rule of court relating thereto designated Monday as the day of the week on which such cases are set for trial, and Thursday, eleven days before such Monday, as the day on which service of the notice to place on such calendar, shall be filed.

Claiming it was led to believe that because of the giving of such notice on Friday instead of Thursday the case would not be heard before Monday, June 14, appellant made a motion to vacate the judgment accompanied by an affidavit based on the foregoing facts. Plaintiff did not resist it and when the court suggested that it should be allowed, appellant, for some undisclosed reason, withdrew the motion, pursuant to which an order of the withdrawal

was entered and execution on the judgment issued. The next day appellant again appeared and renewed such motion without assigning any additional grounds therefor or explanation of its change of attitude, and because of the denial of that motion this appeal is taken.

The contention that the judgment is void is wholly untenable. The court had jurisdiction both of the parties to the cause and the subject matter thereof. Nor did the court abuse its discretion. To hold that it did would countenance a practice of playing fast and loose with the court. If the procedure was irregular and prejudicial appellant could have had redress on its first motion to vacate. But when the court was about to grant it, the motion was withdrawn and assent to the judgment was thus impliedly given.

AFFIRMED.

611 - 22009

VILLAGE OF LA GRANGE, ILLINOIS,
Appellee,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

202 I.A. 343

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the Circuit Court of Cook County dismissing for want of jurisdiction an appeal thereto from the judgment of a police magistrate.

We infer from the arguments and briefs filed that the ground of the dismissal was that the court deemed the appeal as one taken in a quasi-criminal case and hence to the wrong court. Appellant's point is that there was nothing before the court to indicate that it was a case of that character, and that while the Justice's transcript stated it was a claim "for the violation of an ordinance of the village" it may not have been a quasi-criminal case.

The case appears to have come before the court on a motion to dismiss the appeal for want of jurisdiction in which both sides were heard. What was brought before the court in support of the motion to show the character of the case is not made to appear. Presumably something was said or done by which the court could determine the character of the case and whether it had jurisdiction, and in the absence of any showing in the record that it did not decide correctly we cannot assume that it erred in dismissing the appeal.

AFFIRMED.

475 - 21873

STEPHEN L. CHUIPEK, Admr. of the estate of Luke Chuipek, deceased,
Appellant,

vs.

NORTHWESTERN YEAST CO., a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

202 I.A. 344

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellant as administrator of the estate of Luke Chuipek, deceased, for damages for his death alleged to have been caused by the negligence of defendant, by whom the deceased was employed. At the close of all the evidence, the jury by direction of the court, returned a verdict of not guilty, upon which the judgment herein complained of was entered.

At the time of his death, plaintiff's intestate was in the employ of the defendant. His duty was to descend into a corn bin for the purpose of sweeping the walls thereof while the grain was being withdrawn, and while thus employed he became submerged in the grain and death ensued.

The bin in question was one of a series of adjoining bins contained in a large building, all of which were used as receptacles for shelled corn. The grain was withdrawn therefrom through an opening at the bottom, whence, by means of a conveyor, it was carried to the mill. These bins were cylindrical in shape; about 85-feet high and 20 feet in diameter. There were two openings each about two feet square, at the top of each bin; also a spout leading

3021.A. 314

DE. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

This action was brought by appellant to condemn-
ation of the website of Lube Chicken, deceased, for damages
for his death alleged to have been caused by the negligence
of defendant, by whom the deceased was employed. It-is
clear of all the evidence, the jury by direction of the
court, returned a verdict of not guilty, upon which the
judgment hereon complained of was entered.

At the time of his death, plaintiff's intestate
was in the employ of the defendant. His duty was to destroy
by means of explosives the rocks which from time to time
fell within the cuts being worked, and while there
engaged in removing rubbish in the cuts and clean ways.

The job in question was one of a series of
adjacent cuts connected by a large building, all of which
were used as receptacles for refused rock. The track was
situated upon embankments in crossing of the ravines,
at points of a considerable, it was carried on the mill. These
pits were originally to depth; about 60-feet high and 30
feet in diameter. Those were the conditions each of the two
last months, by the 10th of each six; also a usual laundry

from the upper conveyer, by means of which the bins were filled.

While the grain was being withdrawn therefrom, the plaintiff's intestate descended into the bin to sweep the walls for the purpose of removing an injurious germinating dust which frequently adhered thereto. In the performance of this duty, he walked around the surface of the corn. When the bottom of the bin was opened, the conveyer placed in operation and the corn being withdrawn, it caused a depression of some eight or ten feet to form in the middle of the corn surface. Plaintiff's intestate was therefore required to keep to the outer edge of the corn in order not to be drawn into the cavity thus formed. A rope was attached to the back of a harness or belt worn by the plaintiff's intestate and extended up and through a pulley block fastened to a beam in the ceiling and thence to the opening in the bin, where it was tied. While the plaintiff's intestate was working in the bin, another man, named Tony, stayed at the top to slacken the rope as required, and to render any other necessary assistance to the plaintiff's intestate which occasion demanded, while in the performance of this work.

The accident in question occurred on a Sunday evening. The man at the top of the bin (Tony), heard plaintiff's intestate call, "Stop the corn," and observed him submerged therein to a point about four inches below his arm pits, and vainly tried to pull him out by the rope, after which he tied up the rope and called for assistance. The foreman, who had started upstairs when he heard the shouts of Tony, went down into the basement and stopped the machinery, after which the two went to the top of the bin

from the upper container, by means of which the bins were filled.

While the grain was being withdrawn therefrom, the plaintiff's intestate descended into the bin to sweep the walls for the purpose of removing an injurious concentrating dust which frequently adhered thereto. In the performance of this duty, he walked around the surface of the grain. When the bottom of the bin was opened, the conveyor placed in operation and the corn being withdrawn, it caused a depression of some eight or ten feet to form in the middle of the corn surface. Plaintiff's intestate was therefore required to keep to the outer side of the corn in order not to be drawn into the cavity thus formed. A rope was attached to the back of a harness or belt worn by the plaintiff's intestate and extended up and through a pulley block fastened to a beam in the ceiling and thence to the opening in the bin, where it was tied. While the plaintiff's intestate was working in the bin, another man, named Tony, stayed at the top to attend the rope as required, and to render any other necessary assistance to the plaintiff's intestate while occupied therein, while in the performance of this work.

The accident in question occurred on a Saturday evening. The man at the top of the bin (Tony), heard plaintiff's intestate call, "Stop the corn," and observed him signaling thereto to a point about four inches below his ear, and vainly tried to pull him out by the rope, after which he tied up the rope and called for assistance. The foreman, who had started upstairs when he heard the shout of Tony, soon came into the basement and stopped the conveyor, after which the men went to the top of the bin

and descended into it and talked with plaintiff's intestate, who by that time had become submerged to his chin. The foreman then summoned the fireman and engineer of the building, after which it was deemed advisable to again start the conveyor and let the grain out slowly, while two of them held the rope which was attached to the belt worn by plaintiff's intestate. This also proved unavailing, whereupon the conveyor was again stopped and the city fire department summoned. Through the combined efforts of defendant's servants and the members of the city fire department, the body of plaintiff's intestate was extricated, but not until death had intervened.

Plaintiff contends that the court erred in directing a verdict for the defendant. The determination of this question requires an examination of the record in order to ascertain whether or not the evidence submitted by plaintiff makes out a prima facie case of negligence on the part of the defendant.

The first and second counts of the declaration charged in substance that defendant was negligent in failing to properly enclose, fence or otherwise guard the bin in which the deceased was working; that it was possible and practicable to provide plaintiff's intestate, while in the course of his employment, with speaking tubes, electric bells, electric colored lights or other approved and effective means of communication whereby in case of emergency he could have signaled for aid. The evidence submitted does not show, either directly or inferentially, that it would have been either possible or practicable to provide an enclosure or fence or any other kind of guard rail on the inside of the said bin, or to furnish speaking tubes, bells or colored lights. Such evidence was indispensable to sustain plain-

and determined that it was taken with plaintiff's interests, who by that time had become engaged to his wife. The foreman then examined the fixtures and machines of the building, after which it was deemed advisable to again start the conveyor and let the first ride out slowly, while two of them held the rope which was strapped to the boat worn by plaintiff's intestate. This also proved unavailing, whereupon the conveyor was again stopped and the city fire department summoned. Through the combined efforts of defendant's servants and the members of the city fire department, the body of plaintiff's intestate was extricated, but not until death had intervened.

Plaintiff contends that the court erred in directing a verdict for the defendant. The determination of this question requires an examination of the record in order to ascertain whether or not the evidence submitted by plaintiff makes out a prima facie case of negligence on the part of the defendant.

The first and second counts of the declaration charged in substance that defendant was negligent in failing to properly enclose, fence or otherwise guard the bin in which the dredging was working; that it was possible and practicable to provide plaintiff's intestate, while in the course of his employment, with operating tubes, electric bells, elevator covered lights or other approved and effective means of communication whereby to make or maintain in small bore signaled for aid. The evidence submitted does not show, either directly or circumstantially, that it would have been feasible or practicable to provide an enclosure or fence at any other side of dredge well up the inside of the well via, or to furnish operating lines, bells or covered lights. Such evidence was indispensable to sustain plaintiff's

tiff's cause of action as contained in the first and second counts of the declaration.

The third count alleged that it was defendant's duty to maintain servants at the top of the bin in question. The evidence shows that one of defendant's servants was stationed there and that he was performing his duty at the time of the accident; that the plaintiff's intestate had always been able to perform his work with one assistant stationed at the top of the bin, whose duty it was to stay there and hold, guide, fasten and manage the rope which was attached to the belt which plaintiff's intestate wore while sweeping the walls of the bin, and to render any other assistance to the plaintiff's intestate which became necessary. There is no evidence in the record from which it appears that the life of plaintiff's intestate could have been saved had more than one servant been assigned to duty at the top of the said bin. Had this question been submitted to the jury, their judgment would necessarily have been based upon speculation.

In an additional count it was charged that defendant's foreman was negligent in re-starting the conveyor after the plaintiff's intestate had already become partially submerged in the grain. From the evidence adduced, it appears that this method was deemed imperative after defendant's servants had failed in their efforts to extricate him by means of the rope and pulley attached to his belt. In so doing, they can not be said to have acted negligently, for the evidence shows that the conveyor had to be set in operation again after the arrival of the members of the fire department, before they finally succeeded in releasing the body.

After a most careful examination of the record, we are unable to find any evidence from which it can be reason-

ably concluded or inferred that plaintiff's intestate came to his death as a result of any negligence on the part of the defendant, and hence the court did not err in directing a verdict for the defendant. The judgment must therefore be affirmed.

AFFIRMED.

ably considered or inferred that plaintiff's intoxicate came to his death as a result of any negligence on the part of the defendant, and there the jury did not err in directing a verdict for the defendant. The judgment must therefore be affirmed.

AFFIRMED.

532 - 21930

ANTON M. FURMAN, ALEX WISNIEWSKI and MARY MARAY, as sole devisee and legatee under the last will and testament of HENRY MADAY, deceased, Plaintiffs,
Appellees,

vs.

MICHAEL WIECZORKOWSKI, Defendant,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

202 I.A. 347

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court of Cook County overruling motion of defendant (appellant here) to vacate a judgment by confession for rent due on a written lease. The declaration concludes to the damage of the plaintiffs in the sum of $600. In the cognovit the defendant said he "could not deny that he owed the plaintiffs in manner and form as complained against him; nor but that plaintiffs had sustained damages in the said declaration mentioned", including $13.00 as costs and $20.00 for attorney's fees for entering said judgment. The power of attorney is contained in the lease and authorized the waiving of all errors. The cognovit so agrees and expressly releases all errors. Defendant's motion to vacate said judgment was based upon the following grounds:

(1) That the judgment exceeds (a) the ad dammum, and (b) the amount admitted in the cognovit:

(2) That Mary Maday, as sole heir and devisee of Henry Maday, the deceased partner of H. Maday & Co., was not a proper party plaintiff:

MICHAEL ELECTROMOTIVE, Defendant;
Appellant.

vs.

HENRY T. SMITH, PLAIN CLOTHESMAN
and HARRY HARRY, as sole partner
and Secretary under the last will
and testament of HARRY HARRY,
deceased, Plaintiffs,
Respondents.

COOK County,

ILLINOIS PRESS

ER. JUSTICE ECCENTRIC DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court of Cook County overruling motion of defendant (appellant here) to vacate a judgment by confession for rent due on a written lease. The defendant contends to the amount of the plaintiffs in the sum of $500. In the covenant the defendant said he "could not deny that he owed the plaintiff in amount and item on confident motion; nor but that plaintiff has sustained damages in the said declaration mentioned", including $13.00 as costs and $50.00 for attorney's fees for entering said judgment. The power of attorney is contained in the lease and authorized the waiving of all errors. The covenant to release and expressly release said errors. Defendant's motion to vacate said judgment was based upon the following grounds:

(1) that the judgment amounts (a) the is insufficient and (b) the amount admitted in the covenant;

(2) that said Court, as sole and exclusive of [illegible]

(3) Constructive eviction and consequential damages.

(1) It is well settled that to render judgment for a larger sum than that claimed in the declaration is error. Brown et al. v. Smith et al., 24 Ill. 196. Where, however, a defendant, by his attorney in fact, duly authorized, confesses judgment and releases all errors, an appeal or writ of error will not lie to review the judgment itself, but will lie to review the overruling of a motion to vacate the judgment. Boyles et al. v. Chytraus, 175 Ill. 370. Hall v. Hamilton, 74 Ill. 437, was a confession of judgment. The ad damnum was $614, the cognovit confessed an indebtedness of $634 and judgment was rendered for that sum. The court in that case said:

> "On such a record we are unable to comprehend by what rule of law this writ may be maintained. * There is no pretense that plaintiff in error did not execute the warrant of attorney, * and every principle of good faith and justice requires that he should be bound by the action of his attorney within the scope of his authority. Such has always been the doctrine, and we are not aware that it has been controverted; nor do we see how so elementary a principle could be."

Any error committed in entering the judgment in the instant case due to the variance between the damages claimed in the declaration and in the cognovit, was, under the foregoing authorities, waived. In legal effect there is no variance between the cognovit and the judgment.

(2) While the lessees in said lease purported to be H. Maday & Co., a co-partnership, the lease was signed by Anton M. Furman, Alex Wisniewski, and Henry Maday as individuals only, and it became their individual lease. Springer v. Simpson, 175 Ill. App. 631. The lease was executed July 6, 1910. Henry Maday died Jan. 23, 1913, devising and bequeathing all of his estate to his wife, Mary Maday, one of

(2) Comparative evaluation and consequential damages.

(1) It is well settled that to render judgment for a larger sum than claimed in the declaration is error. Green et al. v. Smith et al., 24 Ill. 194. Where, however, a defendant, by his attorney in fact, duly authorized, confesses judgment and releases all errors, an appeal or writ of error will not lie to review the judgment itself, but will lie to review the overruling of a motion to vacate the judgment. Boylon et al. v. Chapman, 173 Ill. 270. Ball v. Tomlinson, 74 Ill. 437, was a confession of judgment. The ad damnum was $614, the cognovit confessed an indebtedness of $614 and judgment was rendered for that sum. The court in that case said:

> "We deem a reason as are unable to comprehend by what rule of law this writ may be maintained. * There is no pretense that plaintiff in error did not execute the warrant of attorney, * and every principle of good faith and justice requires that he should be bound by the action of his attorney within the scope of his authority. Such has always been the doctrine, and we are not aware that it has been controverted; nor do we see how a elementary principle could be."

Any error committed in entering the judgment in the instant case due to the variance between the damages claimed in the declaration and in the cognovit, was, under the foregoing authorities, waived. In legal effect there is no variance between the cognovit and the judgment.

(3) While the leases in said lease purported to be "ready & to", a no-partnership, the lease was signed by Weston M. Parker, Alex Blankenship, and Harry Bailey as individuals only, and it became their individual lease. Partridge v. Chapman, 173 Ill. App. 631. The lease was executed July 6, 1920. Harry Bailey died Dec. 23, 1921, testating and bequeathing all of his estate to his wife, Mary Bailey, one of

the plaintiffs below. It is admitted that the lessors were possessed of the fee to the premises in question as tenants in common. "It is the settled law in this state that rent accruing after the death of the owner of the demised premises is a chattel real and goes to the heir or devisee of said deceased owner, and not to his administrator or executor." Haynes v. McDonald, 158 Ill. App. 294, and cases cited therein. The rent sued upon accrued subsequent to the demise of Maday, and his wife, as sole devisee, succeeded to his interest therein, and was, therefore, a proper party plaintiff.

(3) There was no constructive eviction. The alleged acts of plaintiffs relied upon by defendant as constituting a constructive eviction, as set forth in affidavits filed by him in support of his motion to vacate said judgment, occurred during May and June, 1914. It is not denied that he continued in possession until Dec. 1, 1914. "The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession either actually or constructively, or the premises rendered useless." Rubens v. Hill, 213 Ill. 523, 543.

In the instant case as defendant did not abandon the leased premises his obligation to pay the rent therefor during occupancy, remained. While defendant in his affidavits alleged that plaintiffs by their wrongful acts injured his business, the allegations do not furnish any definite basis upon which defendant might recoup damages against said rent.

In the Lower court defendant was bound to make a clear showing that he had a defense to the action, with his affidavits construed most strongly against him. No such

showing has been made. "A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court whose action in denying it will not be reviewed unless it appears that it had been abused." Koehler v. Glaum, 169 Ill. App. 537.

For the reasons herein stated, the judgment of the County Court will be affirmed.

AFFIRMED.

showing has been made. "A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court which on denying it will not be reversed unless it appears that it had been abused." Dunkley v. Ulrich, 189 Ill. App. 327.

For the reasons herein stated, the judgment of the County Court will be affirmed.

AFFIRMED.

546 - 21944

JOHN J. STRUPLE,
Appellee,

vs.

FRANK P. BISHOP,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

202 I.A. 349

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review the decision of the Circuit Court in quashing a writ of certiorari sued out by appellant and dismissing his petition, under the Workmen's Compensation Act of 1913. On July 21, 1913, John J. Struple, while in the employ of ~~appellant~~ defendant, and in the course of his employment, received injuries as a result of a fall from a ladder. Struple claims that as a result of said accident, he has lost the sight of his left eye. ~~Appellant~~ Defendant contends that Struple's eye was injured long prior to said accident and is now practically in the same condition as it has been for a great many years. There was evidence introduced before the Committee on Arbitration and again before the Industrial Board by the parties, tending to support their respective contentions, and the Industrial Board found, inter alia, that the condition of Struple's eye was the result of said injury, and that under the terms of the Workmen's Compensation Act he had totally lost the use thereof, and awarded him as compensation therefor $10.80 per week for a period of 100 weeks.

There is only one question presented for our determination - Does the evidence tend to show causal connection between the accident in question and the blindness of the eye? It is not within the province of the courts to pass upon the

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JOHN D. MCMURRIN,
Appellee,

vs.

MAGEE P. HIATCH,
Appellant.

APPEAL FROM CIRCUIT COURT,

CASS COUNTY.

MR. JUSTICE MONTGOMERY DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review the decision of the Circuit Court in quashing a writ of certiorari issued out by appellant and dismissing his petition, under the Workmen's Compensation Act of 1911. On July 27, 1913, John D. Murphy, while in the employ of appellant, and in the course of his employment, received injuries as a result of a fall from a ladder. Murphy claims that as a result of said accident, he has lost the sight of his left eye. Appellant contends that Murphy's eye was injured long prior to said alleged and is now practically in the same condition as it has been for a great many years. There was evidence introduced before the Committee on Arbitration and again before the Industrial Board by the parties, tending to support their respective contentions, and the Industrial Board found, inter alia, that the condition of Murphy's eye was the result of said injury, and that under the terms of the Workmen's Compensation Act he was entitled to compensation therefor $10.50 per week for a period of 100 weeks.

There is only one question presented for our determination - does the evidence tend to show causal connection between the accident in question and the blindness of the eye? It is not within the province of the courts to pass upon the

weight or sufficiency of evidence in a proceeding of this kind but to determine if there is any competent or legal evidence to support the decision of the Industrial Board. Parker-Wash. Co. v. Industrial Board, 274 Ill. 498, 502. Paragraph (f) of section 19 of the Workmen's Compensation Act makes the decision of the Industrial Board, in absence of fraud, if it acts within its powers, conclusive upon the courts. There is evidence tending to show that Struple's vision in said eye was good before the accident; that in falling from a ladder, from a height of 14 or 15 feet, his head came in contact with the roof of a shed before descending to the ground; that the second day thereafter he experienced intense pain above the left eye and in the left side of his head, and ten or fifteen days thereafter noticed the loss of sight of his left eye. He further testified that he had no trouble with said eye prior to the injury in question. Expert evidence tended to show that there could be a loss of sight of the eye from such an accident, hence there was proof of a causal connection.

We therefore hold that the Circuit Court did not err in quashing the writ of certiorari and in dismissing appellant's petition, and its judgment will be affirmed.

AFFIRMED.

2277

GENERAL No. 6531. APRIL TERM, 1916. AGENDA No. 33.

JOHN E. MURRAY,

Appellee.

vs. Appeal from Macon.

VANDALIA RAILROAD COMPANY,

Appellant

202 I.A. 362

Opinion by THOMPSON, P. J.

This is an action on the case brought by John E. Murray against the Vandalia Railroad Company to recover damages to certain real estate of the plaintiff in the City of Decatur averred to have been caused by the construction of a freight house and freight terminals by the defendant adjoining said real estate. The declaration avers that the defendant changed the grade of its premises so as to divert water upon the premises of plaintiff, and has created a nuisance adjacent to the property of the plaintiff and that cinders, soot, ashes and clouds of smoke ~~are~~ were thrown on plaintiff's premises and into his house by the defendant and the trees, shrubbery and grass killed and the house rendered substantially uninhabitable and the market value greatly depreciated. On a trial a jury returned a verdict in favor of plaintiff for $487.25 on which judgment was rendered. The defendant appeals.

The evidence shows that appellant acquired a site for a freight house fronting on the east side of Broadway in the city of Decatur and adjacent to and south of Marietta Street. This freight house is about 100 feet west of its main line. East of Broadway the terminal tracks running to the freight house cross Morgan street which is the street

next east of Broadway. The south 20 feet of the freight house site between Morgan street and Broadway is paved and has curbing on its south border extending six inches above the pavement. This paved strip is kept open for public travel. North of this paved site is a platform 20 feet wide. There are six tracks ending at the freight house, the most southerly one of which is about 60 feet from the south line of the freight house site.

The property of appellee has a frontage of 40 feet on the west side of Morgan street and extends west 170 feet adjacent to the twenty foot pavement. There is a frame residence on appellee's lot that was built about twenty years ago. Switching is done on these freight terminal tracks from about 4 o'clock to 7 in the morning and in the evening from 8 to 10 o'clock, and the proof shows that locomotives either standing or running on these terminal tracks at times throw cinders, soot and ashes, which fall on appellee's premises and that smoke and gases from the locomotives are thrown into appellee's house and there is much noise made by the locomotives and moving cars in the vicinity of the freight house. The evidence also shows that the appellant, by raising the freight

terminal site, has diverted and run water upon appellee's lot which would not naturallly run there and that the market value of appellee's premises has been reduced by the construction and use of the freight terminal.

A motion to exclude all the evidence and direct a verdict for appel-

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lant was overruled. It is contended that this ruling was erroneous because the testimony of the witness as to the amount of depreciation is based on elements of damage for which there can be no recovery. The evidence of the witnesses given in chief, with one or two exceptions, appeared to be based only on proper elements of damage. On the cross examination it was developed that appellee's premises were damaged by smoke and soot from other railroads or factories from one to four blocks distant; that detrimental noise was made in unloading freight from the cars, and by the bumping of cars and the grinding sound of wheels; that there was damage from the vibration of the building caused by moving trains and that the value of the premises was depreciated by the danger to occupants of the residence in crossing the terminal tracks on Morgan street. The witnesses were unable to say how much the property was depreciated by each or any item of the nuisance as enumerated in the cross examination.

The witnesses had testified to the entire depreciation of the property caused by the construction and operation of the freight terminals. The declaration only avers damages caused by the diversion of water on the premises of appellee, the running of locomotives over the terminal tracks and permitting them to emit and throw on said premises, smoke, gas, soot, ashes, sparks, cinders, and unhealthy smells, and creating "drivers noises, confusion and annoyances by the ringing of bells and

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blowing of whistles

and the escaping of steam," thereby creating a nuisance adjacent to the said premises. The noise of loading and unloading cars, the grinding of wheels and bumping of cars, and the vibration of the building are not averred as elements of damage. There is no general charge of damage resulting from the construction and operation of the terminal but the damage is limited to the specific items mentioned in the declaration. When the witnesses did not say how much of the damages caused to appellee's premises were caused by all or any of the actionable elements of injury, caused by appellant, that were declared upon, their evidence could not furnish a basis for the recovery of substantial damages. "The witnesses themselves were not able to separate the damages and state what part of their estimate rested on an improper basis. The jury could not separate what the witnesses who made the estimate could not, and no instructions would enable them to do so." The evidence of such witnesses as was based on improper elements of damage or proper elements not declared upon, should have been excluded. City of Chicago vs. Spoor, 190 Ill. 340; City of Kankakee vs. I. C. R. R. Co., 263 Ill. 589; City of Park

Ridge vs. Wisner, 253 Ill. 434; I. C. R. R. vs. Trustees of Schools, 212 Ill. 406.

In a hypothetical question put to a witness, Montgomery, by counsel for appellee the question assumed that appellant "unloads freight there upon the platform at the east end of this freight house" early in the morning and late at night. Counsel for appellee asked another witness:

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"Now I will get you to state to the jury Mr. Shade, by reason and in consequence of the putting in of those tracks, there at the place where you have located, **and the conditions that might necessarily follow,** such as noise from the engines and the smoke and the like—what would be the fair cash value now?" and included in questions put to other witnesses as elements of damage, upon which they were asked to give an opinion, the obstruction of the street by teams, dragging boiler plates on the platform, etc. Objections to these questions were overruled. The objections should have been sustained. This is not an eminent domain proceeding, but it is a suit on the case, wherein the declaration confined the damages sued for, to those caused by certain enumerated elements or causes. The evidence must be limited to the damages averred in the declaration.

It is argued on behalf of appellee that because the judgment is only $487.25, and a large number of witnesses testified for appellee, that the market value of the property has been depreciated from $1000 to $2000 by cinders, ashes, and smoke that are thrown on appellee's premises and by the noise of the engines; that therefore the judgment should be sustained even if there was error in the evidence admitted. A similar number of witnesses testified for appellant, that its market value has not been depreciated, that the value of the house as a residence may be depreciated some, but the value of the lot has been increased as

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much as the value of the house has been depreciated. In view of the conflict in the evidence this court cannot say how much if any damages, appellee should recover, and the admission of the improper evidence was reversible error.

The jury were by consent of both parties permitted to view the premises. At the request of appellee the jury were instructed that the view was not evidence, but was only allowed for the purpose of helping the jury to understand the evidence detailed by the witnesses, and the jury should not consider any fact bearing on the merits of the controversy derived from said view. Appellant contends the giving of this instruction was error. This instruction correctly states the law. Osgood vs. City of Chicago, 154 Ill. 194; Payson vs. Village of Milan, 144 Ill. App. 204.

The court gave the following instruction at the request of appellee. "The court instructs the jury that if you believe from a preponderance of the evidence that the defendant caused and procured divers railroad

tracks, sidetracks and switch tracks to be laid and constructed at and near to the dwelling house, appurtenances and premises of the plaintiff, as described in the declaration, and then and there caused and procured divers locomotive engines to pass over and along the said railroad tracks, sidetracks and switch tracks, and to stand and remain on said tracks near the said dwelling house and premises of plaintiff, and to emit large volumes of smoke, soot, gas, ashes, sparks and cinders, and

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noisome, offensive and unwholesome odors and smells and that it then and there created divers noises, confusion and annoyance by the ringing of bells, the blowing of whistles and in the escaping of steam from said locomotive engines, and that by reason thereof the plaintiff's property described in the declaration is diminished in its market value, then in that event of the proof the plaintiff is entitled to recover in such amount if any as you may believe from all the evidence said real estate has been diminished in its reasonable market value, if any by reason thereof." This instruction omits the element of physical disturbance of appellee's property by casting cinders, smoke, gas, etc., on the premises, and the disturbance of its occupants by said noises. The standing of locomotives on appellant's tracks of itself, and the throwing out of ashes, etc. and smoke, unless they were thrown on appellee's premises are not actionable elements of damage. C. M. & St. Paul R. R. vs. Darke, 148 Ill. 226; North Shore St. Ry. Co. vs. Payne, 192 Ill. 434; Ill. Cent. R. R. vs. Turner, 194 Ill. 575; Calumet Dock Co. vs. Morawetz, 195 Ill. 398; Hyde Park Light Co. vs. Porter, 167 Ill. 276. For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

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2281

GENERAL No. 6545. APRIL TERM 1916. AGENDA No. 76.

WILLIAN JOHNSON,
Appellee.

vs.

THE CHICAGO & ALTON RAILROAD COMPANY,
Appellant

Appeal from Pike.

202 I.A. 369

Opinion by THOMPSON, P. J.

William Johnson brought this suit in case against the Chicago and Alton Railroad Company to recover damages for personal injuries averred to have been sustained through the negligence of defendant. A jury returned a verdict in favor of plaintiff for $5,500 on which judgment was rendered. The defendant appeals. On a former appeal by the defendant a judgment in favor of plaintiff for $5000 was reversed and the cause remanded. Johnson vs. C. & A. R. R. Co., 193 Ill. 632.

The declaration contains six counts and is the same as it was at the first trial. The negligence averred in the first count is that in November, 1912, while appellee was driving across appellant's track near a rock crusher, it negligently and carelessly rang the bell and blew the whistle on its locomotive near the horses which were frightened thereby, etc.

The second count avers that appellant negligently deposited timbers north of the crossing on the line of the highway in a large pile, six feet high, and while appellee was driving along the highway across the railroad, appellant negligently rolled one of the large timbers off the top of said pile to the ground "upon and along the west line of the said

public highway," near and toward the horses and thereby frightened them, etc.

The third count avers that appellant was negligent in unloading from a car, crushed rock and pulverized stone on the ground along and upon the line of said public highway, so near the team driven by appellee that dust arose in the face of and enveloped and frightened said horses, etc.

The fourth count avers negligence in permitting steam to escape with great noise from a steam exhaust box near the line of the public highway towards and near the team which thereby became frightened. The fifth and sixth counts are combinations of the averments in the other counts with the further averment in the sixth that the combination of the alleged negligent acts caused the injury.

Appellant did not demur to the declaration or to any count but filed a plea of not guilty. At the close of appellee's evidence, appellant entered a motion to exclude all the evidence and tendered an instruction directing a verdict of not guilty. The court denied the motion and refused to give the instruction. Appellant then, and again at the close of all the evidence, entered a motion to exclude all the evidence admitted

under counts three and four and all under counts five and six except those parts charging the negligence referred to in count two, and tendered an instruction to the jury, "to find the defendant not guilty" as to counts three and four and as to said parts of counts five

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and six. The court overruled the motions and refused to give the instructions.

The motion to exclude the evidence applicable to certain counts and parts of counts was in effect a demurrer to such evidence. A demurrer to evidence is not applicable to a defect in pleadings as such demurrer does not extend to them. Rothschild vs. Bruscke, 131 Ill. 265. Neither can a defect in a declaration be reached by a request for a peremptory instruction. Gerke vs. Fancher, 158 Ill. 375.

The averments in the third, fiifth and sixth counts that appellant negligently unloaded pulverized stone along and upon the line of the public highway, so that dust arose and enveloped the horses thereby frightening them, etc, are statements of a good cause of action, although it may be said the averments are somewhat defective, but the averment is that the pulverized stone was being negligently unloaded upon the highway so that the dust enveloped the team. The averment in the fourth count, that appellant negligently permitted steam to escape on its right of way near the highway, did not state a cause of action without the further averment that such negligence was reckless or wilful. It is not even averred that the steam interfered with the horses on the highway although the proof showed that the steam enveloped the horses on the highway. There was no motion for the exclusion of this evidence concerning the steam, after appellant closed its evidence, even if such evidence might properly have been excluded, that did not ask for the exclusion of the

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evdience admitted in support of the third count which was proper. There was therefore no error in overruling the motion and refusing the instruction. The instruction was also erroneous in form, since if the contention of appellant was proper it should only have told the jury that there could not be a verdict against appellant under such allegations and the evidence in support of them, and that such counts and parts of counts were excluded from their consideration.

The court did give two instructions, the 35th and the 28th,—given at the request of appellant,—which are applicable only to the 4th count and to the giving of statutory signals as averred with other things in the fifth and sixth counts, which in substance told the jury there could be no recovery under those averments. The 35th instruction is:—"The court instructs you, as a matter of law, that the defendant, The Chicago and Alton Railroad Company, may run its trains upon its tracks beside the adjoining highway or public road and that it will not be liable to a traveler upon said adjoining highway, or public road, by reason of its statutory

signals, such as the ringing of a bell, or the sounding of a whistle, or for emitting steam or smoke, or creating a noise in the operation of its trains, unless they are so unreasonable as to amount to a wilful disregard of the rights of persons who are travelling upon an adjoining highway."

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The 28th instruction given at the request of appellant also told the jury that appellant had the right to use its property in the usual and reasonable way and if it believed from the evidence appellee received his injuries on account of the use by appellant of its property in the usual, reasonable and proper way then the verdict must be for appellant.

Appellant, after the motion to exclude all the evidence admitted under counts three, four, five and six, except that alleged in count two had been denied and the accompanying instruction had been refused, then tendered an instruction directing a verdict for the appellant on the first count which the court gave. If appellant had requested an instruction informing the jury that there could not be a verdict against it under the averments of the fourth count the court doubtless would have given it, but there was no reversible error in refusing the instruction which asked for more than appellant was entitled to under the law. It is not error to refuse an instruction directing a verdict when the declaration contains one good count and there is evidence sustaining the good count. Kennedy vs. Aetna Life Ins. Co., 242 Ill. 396; Rolfe vs. Rich, 149 Ill. 438.

The evidence shows that appellant's railroad runs west from Roadhouse and crosses the Illinois river at right angles, after passing through the village of Pearl, about a half mile west of the river. On the north side of the railroad track, about midway between the village and the river, the appellant owns and operates a rock crusher. There is a high

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rock bluff north of the railroad, the south end of which terminates near the crusher. Stone is quarried from this bluff and crushed and used by appellant for balast. About 150 yards west of the crusher, a side track leaves the main track on the north side and this side tracks divides into two tracks about 100 feet west of the crusher building. These tracks curve to the north and run on the south side of and substantially parallel with the crusher building. The southwest corner of the crusher building is 75 feet from the main track and is the part of the building nearest to that track. After these tracks pass this building they continue on in a north easterly direction. The most northerly of these switch tracks is called the crusher track, the other is called the screenings track and is on an embankment about five feet high. A public highway leaves the village of Pearl and runs in an irregular course in an easterly direction on the south side of the railroad track about 50 yards from it and approximately parallel with the track, until it reaches a point south of where the switch track branches from the main track. There it divides and one road runs on east, the other runs north easterly and crosses the

main track in a diagonal direction at a point where the distance between the center of the main track and screenings track is about 38 feet. The public road continues on towards the northeast substantially parallel with the screenings track. This road is rough and rocky and crosses a a creek just before the road branches and from that point to where it crosses the railroad it is a steep up grade. After crossing the rail-

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road there is a slight up grade for about 150 yards northeast of the crossing, after which there is a rocky down grade for a short distance to a culvert. In the space between the main track and the screenings track north of the public road, appellant had four piles of bridge material; the pile nearest the crossing consisted of heavy timbers twelve inches square and from eighteen to twenty-two feet long; the others were composed of smaller timbers and lumber. These timbers were piled parallel to and within a very few feet of the travelled track on the public highway.

North of the screenings track and south of the west end of the crusher house, and about fifty feet from the pile of large timbers was a pile of screenings which had been shovelled from cars, when there was a shortage of cars for screenings. The distance between the travelled track on the public road and the nearest side of the screenings was not over twenty feet. South of the east end of the crusher buildnig and about twenty-five feet north of the travelled track on the public road, and about fifty feet from the pile of screenings, was a steam box on the right of way of appellant. This box was about thirty inches square and extended nine or ten feet above the ground. Its use was to discharge exhaust steam into the air. The public road has been in the same place for over 38 years, but there are no fences on either side of it in the vicinity of appellant's railroad, crusher and quarry. The highway was about 50 feet wide and was fenced many years ago but the fences were removed when the crusher was

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established.

The record contains a plat of the vicinity, offered in evidence by appellant, showing the location of the railroad track, the crusher, the travelled road, the timber piles, the screenings pile and the steam box. which is drawn to a scale of fifty feet to the inch. If the plat is correct and the travelled road is in the center of a highway fiifty feet wide, then the timber piles of appellant and the screenings pile were partly on the public highway. The steam box according to the plat is not on the highway but close by the side of it, but the evidence of some witnesses as to its distance from the travelled road would locate it on the highway. There was also a locomotive and caboose in attendance on the chusher which were known as the balast train and which at the time the appellant with his team crossed the track was about midway between the crusher plant and the river.

The appellee is a farmer sixty-two years of age, who lives a few miles north of the crusher plant. The village of Pearl was his trading place and his route to and from the village was past the crusher on this road crossing the railroad. On the morning that he was injured, he drove to Pearl, a team hitched to a lumber wagon with both end gates out, to get some scantling and corrugated iron roofing. On the way home about 10 o'clock in the morning, the team, after crossing the railroad, ran away and, just after crossing the culvert northeast of the crusher threw appellee out of the wagon, breaking his right leg between the ankle and the knee

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so that the bones protruded through the skin in different places, and his left ankle was dislocated.

It is argued that the court erred in the admission of evidence offered on behalf of appellee. Henry Carlton, a witness who met appellee's team running away about a mile from the crusher and stopped and tied the team to a tree, after that drove past the crusher, testified in rebuttal of the evidence of the employees of appellant that they did not roll any timbers upon the highway that day, that there was, about ten minutes after he stopped the run away team, a timber lying in the middle of the road by the pile of timber near the crossing. The evidence for appellee is that when he drove by the crusher the employees of appellant rolled a timber off the pile upon the road. The evidence for appellant is that its employees did not roll a timber upon the road as the team went by, nor at any time. It is argued on behalf of appellee that the fact that a timber was on the road immediately after the accident is corroborative of the averment that the timber was rolled off the pile as the team was passing. The issue is, was the timber rolled by the side of the team as it passed. The evidence should have been confined to the time the accident happened or it should have been shown that there had been no change in the position of the timbers since appellee drove by. This evidence however was afterwards excluded, and the court also gave an instruction to the jury at the request of appellant telling it that the

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evidence of Carlton was excluded and it should make up its verdict without in any way considering his testimony. This evidence was admitted in rebuttal of the evidence of appellant, that its employees did not roll any timbers off the pile upon the road that day, which was not excluded, under such circumstances its admission did not prejudice the jury against appellant. Appellee was also permitted to testify that up to the day of the accident a team had never run away with him. This evidence was immaterial but harmless.

It is contended that the court erred in permitting Dr. Thurman to testify that the injury received by appellee was permanent. There was no question about the injury received by appellee or how it was received. The doctor was called to treat him when he was first injured, and

treated him while he was under a physician's care. There was no error in that regard in the ruling of the court..

It is also argued on behalf of appellant that the evidence does not show that appellee was, at and before the time he was injured, in the exercise of ordinary care for his own safety, in that he was driving a fractious team, the harness of which was defective. At the request of appellant a special interrogatory was submitted to the jury asking it to find from the evidence whether appellee was guilty of any negligence which contributed in any degree to his injury. To this the jury answered, "No," and this specific finding supports the general verdict. There is a conflict in the evidence as to the action of the horses during the morning before the accident. There is evidence that the team was frightened on

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the road to Pearl before it got near the crusher. Appellee got thirteen peices of scantling out of a freight car at Pearl. He testified that his horses did not take fright while he was at the car or any time that morning until the employees of appellant rolled a large timber off a pile of timber at the crossing close by the side of his team, just before the injury was received. Two disinterested witnesses testified that the team was frightened and jumping as he drove away from the car. After getting the scantling into the wagon, appellee drove to the depot to get the corrugated iron roofing. There were two bunches of the iron roofing composed of sheets about twelve feet long and two feet wide. One of the bunches was loose, some of the clamps being broken. There is evidence that the horses were lunging and acted frightened from the noise made in loading the iron, while appellant testified that the team was not frightened while at the depot. Between the depot and the railroad crossing appellee stopped his team and tied the load to the wagon bed and also picked up from the road two pieces of rock, each weighing about twenty-five pounds, and put them on the top of the load, he says to keep the load from slipping backwards and forward and appellant argues to keep it from rattling. There is evidence tending to show that the right line of the harness, which was eight years old, had a cut in it about four feet from the end, and that in attempting to hold the team in their fright, while passing the crusher the line broke and that the breaking of the line was the cause of the injury. There is also evidence that the har-

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ness was in good condition, and that appellee had the lines wrapped around his hands and that the line broke after he was thrown out of the wagon while he was being dragged over the ground still holding to the lines. The evidence also tends to show the team was a gentle one although one was named "Teddy," and that appellee had driven it to town over this road two or three times a week for several weeks. Upon a review of the evidence, this court cannot say that the jury were

not justified in finding that appellee was in the exercise of ordinary care.

It is further contended that the evidence does not show that appellant was guilty of any actionable negligence. The appellee testified that as he drove on the travelled track on the public highway there were two of the employees of appellant on one of the piles of timber, which is shown to have been on the public highway and that they rolled a large timber twelve or fourteen inches square and sixteen feet or more in length off the top of the pile eight feet high, to the ground, at the front of and within five feet of the side of the near horse; that the near horse jumped against the off horse and they started to run east and that a train came from the east on the main line whistling and ringnig the bell; that a man was shoveling screenings to a pile of screenings on the ground out of a car on the screenings track and the wind blew dust across the highway on the horses, and made them run harder and that steam was puffing out of the exhaust pipe and settling over the road and that made the horses crazy.

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Appellee is corroborated as to the rolling of the timbers off the pile by the side of the horses by a witness Knox, his cousin, who was running the friction hoist on the top of the crusher. He testified that there were two men on the lumber pile who rolled a timber to the ground when the team was passing by it. The witness, Knox, is discredited, among other things, by a written statement made by him shortly after the accident, in which he stated that he saw a gang of men on the pile of timbers at the crossing near the crusher and that, "I will not say bridge men were rolling or moving timbers when he came up but they were on the pile." Another witness, Brunaugh also testified that he was at work in the crusher and saw Johnson with his team approach the crossing and two of the bridge men, who were on the pile of timbers with cant hooks, roll a large timber off the pile within five or six feet of the left track of the wagon road, which scared the team, but he says the horses were dancing as they approached the railroad. Neither of these witnesses knew of the injury to appellee until they were told about it.

There were two gangs of men with push cars taking timbers from these piles to the bridge over the river that morning. There were six men in a gang. Two of these men testify they were on a pile of timbers when a team went by, when the push car had been put off the track ninety feet east of the crossing for a train to go by about ten A. M. and that they didnot roll any timber off the pile. The other four men of the gang

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were at the push car, where it had been taken off the track to permit the train to go by, all testify that no timber was rolled off the pile when the team went by and that they slid the timbers on skids from the pile to the push car and that they did not see the runaway or know anything about it until they were afterwards told about it.

The appellant requested and the court submitted to the jury the following special interrogatory to be answered by it.

Did the plaintiff William Johnson lose control of his team until after he had passed the exhaust box? The jury answered, "Yes," to this interrogatory.

There is evidence supporting the actionable negligence averred in the third, fifth and sixth counts and the jury found that appellee lost control of the team before the steam box was passed. It was very properly a question for the jury to pass upon whether the appellant was guilty of the actionable negligence alleged, and whether such negligence was the proximate cause of the injuries suffered by appellee. We cannot say that the verdict is against the manifest weight of the evidence, where three witnesses testified to facts, which if true, clearly show the appellant guilty of actionable negligence that is averred in the declaration.

It is argued that the trial court gave an erroneous and misleading instruction at the request of appellee. The instruction of which complaint is made told the jury that count one of the declaration should not

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be considered by the jury in arriving at their verdict, and that all instructions given which refer to counts refer only to counts two, three, four, five, and six. The only other instructions given at the request of appellant are five stock instructions concerning the credibility of witnesses and one as to the form of the verdict. The instruction as given does not, and no instruction given at appellee's request makes any reference to the negligence averred in any count and we see no error in it.

The evidence was closed on Saturday. After the appellant had announced that it had closed its evidence, it entered a motion for the postponment of further action in the case until Monday, that it might procure a witness from Denver to contradict some statements made by the witness Knox, who had testified on behalf of appellee. On re-examination Knox had testified that the statement signed by him, which appellant offered in evidence, had been made to the claim agent against his will after four or five men had been to see him about it, and that he said at the time, "I will make it as light as possible because I am not under oath." An affidavit, made by a claim agent of appellant, was filed stating that he believed that the former claim agent of appellant, who procured the statement made by Knox, and who is not now in the employment of appellant, would testify that the statement signed by Knox was made willingly and voluntarily. Knox gave the names of men, employees of appellant, who had come to see him about making the statement.

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Some of these men were witnesses for appellant on this trial and appellant did not question Knox as to what he had told them. At the former trial Knox did not testify that the statement was made unwillingly. He

was then in the employ of appellant but was discharged, after the first trial. The evidence of the claim agent, even if he would have testified that the statement was made willingly, was only impeaching testimony. The rule is that a continuance or postponment will not be granted for the purpose of obtaining a witness to impeach one who has testified. 4 Encyc. of Pl. & Pr. 853. This was a matter resting in the sound discretion of the court and there was no error in denying the motion.

It is also argued that the judgment is excessive. Appellee before the injury was a strong healthy man. His leg was so badly broken that the pieces had to be held together by metal plates. He has paid over $500 for surgical attendance and is a cripple for life and has suffered excruciating pains and still suffers. There is no merit in this contention. There is no reversible error in the case and the judgment is affirmed.

Affirmed.

GENERAL No. 6581. APRIL TERM 1916. AGENDA No. 70

FRANK J. WOTTOWA,

Appellee.

vs. Appeal from Christian.

ORAH D. RIDGLY,

Appellant.

202 I.A. 384

Opinion by THOMPSON, P. J.

This suit was begun August 2, 1915, in the circuit court of Christian County by Frank J. Wottowa, filing an affidavit for an attachment, in which it is stated that Orah D. Ridgly and J. T. Long are indebted to him in the sum of $4,121.30 upon a contract for the sale of lands and notes in consideration of the sale of a stock of merchandise to Orah D. Ridgly and J. T. Long for which Orah D. Ridgly and J. T. Long agreed to pay, and that Orah D. Ridgly is not a resident of this state and that her place of residence is a t Kansas City, Missouri, post office address, Overland, St. Louis County, Missouri, or St. Louis, Missouri, care of J. T. Long, Majestic Hotel. A writ of attachment was issued against Orah D. Ridgly and J. T. Long which was returned not served. Notice of the attachment was published.

A declaration consisting of three special counts and the common counts was filed against the defendant Ridgly. On August 23, 1915, defendant Ridgly entered a limited appearance and moved to quash the service. This motion was overruled. She then filed a plea in abatement of the writ, in which she avers that at the time the affidavit for the attachment was filed, she was not a resident of Kansas City, Missouri,

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but that on August 2, and for fifteen days prior thereto she was a resident of the City of Chicago. She also filed a plea of the general issue to the declaration. On the trial the court ordered the first and third counts withdrawn from the consideration of the jury and by an instruction told the jury that there was no evidence of damages sustained by the plaintiff under the second count. The case was submitted to the jury on the evidence admitted under the issues on the plea in abatement and under the common counts. The jury returned a verdict finding the issues on the affidavit for the attachment for the plaintiff and a verdict finding the issues for plaintiff and assessing his damages at $4,000. Defendant entered a motion for a judgment non obstante, a motion for a new trial and a motion in arrest of judgment which were severally overruled and judgment rendered against defendant Ridgly for $4,000.00. From that judgment this appeal is prosecuted by defendant Ridgly.

It is contended on behalf of appellant that there is no evidence to sustain the verdict against her on the issue on the attachment. It is also argued that the affidavit for the attachment is insufficient. While the writ was issued against Mrs. Ridgly and Long, no cause for the writ

(Figure 1)

against Long is pretended to be stated and the writ should not have been issued against his property. There is no assignment of error that questions in any way the sufficiency or form of the affidavit or writ. The only assignment of error under which any question concern-

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ing the attachment can be reviewed is that the verdict is against the evidence. It is said there is no evidence that Mrs. Ridgly was a resident of Missouri. She admits she was a resident of Missouri prior to July 16, 1915, and testified that on July 16th, she moved to Chicago and lived at the Morrison Hotel until July 29th, when she rented and took possession of flats in Chicago. The lease introduced by her was dated July 30, 1915. Under this lease she rented the flats from Sept. 1, 1915, to Sept. 30, 1916, at $50 per month payable monthly in advance.

Hontie Edwards, a witness called by appellant testified that she had known appellant fourteen years, and that she had been in appellant's employment. She testified that Mrs. Ridgly did not move into the flats until ten days or two weeks after the date of the lease. That she was in St. Louis getting her furniture to move into the flat during that time and that she received a letter from her from St. Louis in August, before she had moved. The finding of the jury on that issue is not against the weight of the evidence.

The evidence shows that the appellee was a merchant in Belleville, Illinois. In the summer of 1913, he became acquainted with Orah D. Ridgly and J. T. Long, at Keener, Missouri, where he went with one H. B. Montgomery, who took a number of parties from Belleville to Keener in an attempt to promote a smelter enterprise. Long was the general manager and Mrs. Ridgly was the secretary and treasurer of the Orah Land and Investment Company, first incorporated as the Orah Land and Mining

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Company, and also the Ozark Railway; which are Missouri corporations. Appellee at that time had sold out his mercantile business but had leased another building and was buying stock to open a store in the fall. Long advised him to put his money into the Orah Land & Mining Company and Mrs. Ridgly said they desired him to join them and not waste his time in a little store. The appellee was by various means led along and induced to sell his store, the goods of which invoiced $3,735.40, to Mrs. Ridgly and Long. Appellant claims that full payment was made by the appellee receiving a deed from Mrs. Ridgly for 160 acres of land in Missouri, in which the consideration is put at $1.00 but which was to be taken at $2,000.00 and also twenty $100 notes made by one Knapp secured by a mortgage on a quarter section of land adjoining that deeded to appellee by appellant. Knapp is now a porter on a pullman car but was at one time in the employ of the Orah Land & Investment Company. Appellee testified that the deed and notes were given

and accepted only as collateral security for the payment of the purchase price of the merchandise which was to be paid within four months.

Appellant went into possession of the stock of merchandise, converted it into cash but has failed to make any payment to appellant with the exception of $60 paid by Long on account of interest on the Knapp notes. After the sale appellee appears to have worked for appellant on a monthly salary and commission and the evidence also shows that there was something due appellee for salary and commission.

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Appellant denies that she took any part in the transactions that ended the sale of the stock of goods to her, and denies substantially every conversation that appellee testifies to having had with her. After a careful reading of the record we cannot say that the verdict and judgment are not fully sustained by the evidence.

It is urged that the court erred in admitting evidence of statements made by Long for the reason it was not shown that he was appellant's agent. She admits that she had held the title to lands which she had transferred to the corporation of which she was secretary and treasurer and of which Long was a director and manager. He arranged meetings between appellant and appellee and conducted most of the negotiations some of them in her presence. The evidence of Long and appellant can lead to but one conclusion, that he was acting in connection with and under her direction. She was fully advised of every step in the transaction and approved of all that Long did.

It is also argued that the court erred in refusing to send the pleadings with the jury to their room when they retired to consider their verdict. The Supreme Court of this state has said that the practice of permitting the jury to take the pleadings to the jury room is not to be commended, yet, it is not reversible error. Elgin A. & S. Traction Co. vs. Wilson, 217 Ill. 47.

The principal contention of appellant is that appellee accepted the deed dated Feb. 25, 1914, made by appellant and the notes and mort-

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gage made by Knapp with a guarantee letter dated Feb. 26, 1914, as payment in full and that they are the contract between the parties, and therefore evidence of the negotiations and facts occuring prior to that time were inadmissible in evidence.

The testimony shows that there was no written contract signed by the parties. The sale of the stock of merchandise was made by a verbal contract. The deed and notes and mortgage with the guarantee signed by appellant and Long are not evidence of the contract of sale but are only incidental to the sale. The deed is dated February 5. The guarantee is dated Feb. 26, but the evidence shows it was executed a day or two earlier at St. Louis. They were made without appellee's knowledge and in his absence. Long stated at the time the papers were delivered

Affirmed.

GENERAL No. 6463. OCTOBER TERM, A. D. 1915. AGENDA No. 3.

ELIZA B. CARNEY, Administratrix of the Estate of WILLIAM E. CARNEY, Deceased,
Appellee.
vs.
GEORGE W. BAKER,
Appellant.

Appeal from Circuit Court of DeWitt County

ELDREDGE, J.

202 I.A. 396

Appellee recovered judgment in an action of assumpsit against appellant for the sum of $384.10. William E. Carney, the deceased, worked on the farm of appellant and also operated a corn sheller and hay baler for the latter. It appears that the deceased was employed at the rate of $30 per month for his services on the farm except when engaged in shelling corn or baling hay at which times he was to receive $2 per day. Appellee in the court below claimed wages earned by the deceased from March 1, 1912 until February 9, 1914, but the great weight of the evidence shows that the deceased did not move on to the farm until the latter part of October 1912, and only worked for appellant for about one week prior to his moving onto the farm. The evidence further shows conclusively that a number of farmers paid the deceased direct for baling done by him, and the amounts so paid were not credited to appellant by the jury in fixing the amount

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of its verdict.

The accounts of appellant were kept in what is known as the McCaskey system. Appellant attempted to testify in identification of his account books, but the court sustained objections to such proffered evidence on the ground specifically that he was an incompetent witness for the reason that appellee was prosecuting the suit as the administratrix of a deceased person. Section 3, Chapter 51, R. S. has been construed to mean that in all cases a party may testify to the extent necessary to admit his books of account in evidence notwithstanding that the adverse party may be suing or defending in one of the capacities mentioned in Section 2 of said Act. Miller & Grand v. Pratz, Ex. 179 Ill. App. 204; McGlasson v. Housel, Ex. 127 Ill. App. 360; Alling v. Brazee, Adm. 27 Ill. App. 595.

It is apparent that the jury failed to give appellant credit for several other items which the evidence conclusively shows he was entitled to, but as the judgment must be reversed for the error indicated, it is unnecessary to mention them here in detail. The judgment is reversed and cause remanded.

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GENERAL No. 6504. APRIL TERM, A. D. 1916. AGENDA No. 9.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.
vs.
KATE HEXTON,
Plaintiff in Error
Error to County Court
Morgan County

202 I.A. 414

Eldredge, J.

Plaintiff in error was convicted in the County Court of Morgan County for selling liquor in anti-saloon territory and was sentenced to imprisonment in the county jail of said county for a period of thirty days and to pay a fine of $200 and costs, and in case said fine and costs should not have been paid at the end of the said term of imprisonment that she be required to work out the same at the rate of $1.50 per day for each day's work. Plaintiff in error at the end of said thirty days filed her petition in County Court setting forth that she had served the 30 days imprisonment, but that she had no money or property with which to pay the fine and costs; that she is ill and afflicted with diseases of internal character which make it impossible for her to work out the fine and costs; that the close confinement in jail had caused irreparable injury to her; that all legal means for collecting said fine and costs

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have been exhausted and prays that she be discharged and released from that part of judgment imposing the fine and costs.

It is claimed that under paragraph 435 of the Criminal Code, that whenever it is apparent to the court that any person confined in jail for any fine or costs has no estate wherewith to pay the same, it shall be the duty of the court to discharge such person from further imprisonment. In the case of People v. Jaraslowsky, 254 Ill. 299, it was held that this paragraph did not apply to a case where the judgment of the court required the defendant to work out the fine in accordance with paragraph 168 of the Criminal Code. The County Court after a full hearing upon the question of her physicial condition denied the prayer of her petition and remanded her to jail. While it is true that a County jail cannot be said to be conducive to the betterment of a person's physical condition, and while the proofs show that plaintiff in error was afflicted more or less with a deceased condition, yet we do not think that the facts disclose any abuse or discretion on the part of the court.

The judgment is therefore affirmed.

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GENERAL No. 6507. APRIL TERM, A. D. 1916. AGENDA No. 12

E. GRANT WEIR, Appellant.

vs.

CRAN CRANDALL, Appellee

Appeal from Circuit Court, Clark County

ELDREDGE, J.

202 I.A. 415

Appellant sued appellee before a Justice of Peace to recover the value of his dog claimed to have been killed by the latter, and upon a trial his claim was defeated. He appealed to the Circuit Court where another trial also resulted in a verdict for appellee on which verdict judgment was entered, and from which judgment this appeal is prosecuted.

The whole controversy rests upon the simple question whether appellee killed appellant's dog. This issue has been found adversely to appellant upon two trials, and the result is apparently supported by the weight of the evidence. We do not find any error in the record of sufficient merit to justify a reversal of the judgment, which is therefore affirmed.

GENERAL No. 6510. APRIL TERM, A. D. 1916. AGENDA No. 15

INDIA SMITH,

Defendant in Error,

vs.

JOHN B. NORRIS,

Plaintiff in Error.

Writ of Error to the Circuit Court of Macon County

202 I.A. 416

ELDREDGE, J.

This is an appeal from a judgment amounting to $442.22, obtained by defendant in error against plaintiff in error in an action of assumpsit.

The declaration comprises three counts. The first alleges that the defendant on the 31st day of October, 1912, by one Wiley Smith, his then agent in that behalf, borrowed of the plaintiff, and the plaintiff at the special instance and request of said defendant then and there loaned the said defendant the sum of $400 etc.

The second count alleges that the defendant on the 21st day of October, 1912, was doing business by the name of the "J. B. Norris Ranch" and the plaintiff at the special instance and request of said defendant loaned to the defendant and the defendant then and there borrowed $400 to be paid by defendant when he should be requested; that the defendant by one Wiley Smith, his then agent in that behalf, executed and delivered to the plaintiff his certain written instrument and

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and thereby then and there acknowledged that there was due the plaintiff the sum of $400 for money loaned the defendant by the plaintiff etc.

The third count consists of common counts consolidated.

The instrument sued on is as follows,

"Morral, Ohio ———— 191—

Twin Falls Idaho Oct. 31st 1912 due Mrs. India Smith four hundred dollars ($400) for money loaned J. B. Norris Ranch account Bank Draft from Morral, Ohio.

J. B. Norris Ranch
By Wiley Smith."

On August 23rd 1912, plaintiff in error, John B. Norris, of Maroa, Illinois, as party of the first part, and Wiley Smith of Harpster, Ohio, husband of plaintiff in error, as party of second part, entered into a written lease or agreement which recited that Norris had on that day, leased and demised to Wiley Smith, certain real estate in the County of Twin Falls, State of Idaho, and in consideration of said lease and other terms and agreements thereinafter set forth, Wiley agrees to farm said premises in a proper, seasonable and workmanlike manner; to cut and harvest the crops grown thereon; to irrigate and tend the crops when necessary; to keep said lands free from weeds and other noxious vegetation; and to keep the ditches, laterals and other waterways clean and free from weeds, debris or deposit of any kind. The lease also recited the fact that Norris on the date thereof was the

owner of one thousand ewes, which the parties to the lease agree were of the value of $4 per head; that said ewes shall remain the property of Norris at all times except as thereinafter provided, it being the intention of the parties thereto to feed the sheep and other stock which may be brought upon the premises through the terms of the lease with the crops grown thereon; that the parties thereto may thereafter buy other sheep, hogs cattle or stock of any kind for the purpose of feeding with the crops grown thereon, together with other crops which may be purchased; that Norris agrees to furnish all funds necessary to purchase the stock mentioned which shall be his absolute property; that Norris shall pay all taxes upon said land during the term of the lease and each party to pay one-half of the water maintenance; that Wiley agrees to farm said land and properly feed and care for all sheep and stock which may be brought upon the premises under the agreement; that all such stock shall be sold at such time and in such manner as the parties thereto may agree and from the proceeds thereof each of the parties shall share alike in the profits, such profits to be determined after Norris has been fully reimbursed at $4 per head for the ewes brought upon the premises together with 8 per cent interest thereon from the date of the agreement together with any other expense advanced by him; the profits arising upon all other stock purchased by Norris to be determined by fully reimbursing him for the purchase

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price thereof together with whatever interest Norris may be required to pay for the money to be borrowed by him for the purchase of said stock; that Wiley is to farm said premises and feed, care for and handle said stock of any kind at his own cost and expense in so far as the labor is concerned; that all crops shall be planted, cultivated and harvested by Wiley at his own cost and expense; that such crops as cannot be fed to the stock, Wiley agrees to deliver to Norris at the elevator nearest to the lands in question his share thereof; that Wiley is not to keep more than eight horses and four cows upon the farm; that each party shall pay one-half of the cost of shearing the sheep and shall share one-half the profits from the sale of the wool therefrom if the original cost of the sheep shall have been paid; that the parties shall have a complete accounting on or before the first day of September, 1913; that also Wiley shall keep Norris notified of all sales and make a complete statement thereof in all matters in connection therewith at all times; that Wiley shall not sublet or lease any part or portion of the premises and shall keep the same in crops, and feed the same to the stock; that he shall keep the buildings in good repair and deliver the same to Norris at the termination of the lease; that Norris shall have the right to reenter said lands if the provisions of the lease are broken, or plow any portion thereof in the fall of 1913, and to have all hay land after the

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second cutting thereof, and all pasture when there is an insufficient number of stock to require the use of such pasture land; that Wiley shall haul and distribute the manure which may accumulate about the barns and stables in a proper manner, and shall stack all straw or hay upon that part indicated by Norris.

Wiley sold his personal property in Ohio, which it appears was in his wife's name, and moved on to the farm and thereafter proceeded to farm the same under the terms of the lease. He borrowed $400 from the defendant in error, who was his wife, and executed the due bill heretofore mentioned, and used the money for his own personal expenses. Norris knew nothing about the transaction and never gave Wiley any authority of any kind to borrow money in his name.

The declaration charges that Norris individually borrowed this money through Wiley, his agent, yet defendant in error on the trial of this case advanced and sought to maintain the position that her husband and Norris were partners under the firm name of J. B. Norris Ranch, which partnership was a trade or commercial one whereby her husband had authority as a partner to borrow this money from her in the name of the partnership. The court gave a large number of instructions to the jury based upon the theory that if they believed that Wiley and Norris were partners in a trade or commercial partnership then he had a right to borrow the money from his wife, execute the

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due bill and thus make plaintiff in error liable for the amount thereof. It is urged by plaintiff in error that the partnership, if there was a partnership at all, was a non-commercial or non-trading partnership under the authority of Urey v. Ginerich, 57 Ill. 531 and Freeman v. Gordon, 59 Ill. App. 189, and therefore one partner had no authority to bind the other by giving promissory notes or due bills in the firm name. From the view we take of this case it is unnecessary to decide the character of the partnership if there was one. There is no proof whatever, that Wiley, the husband of defendant in error, was the agent of Norris, the plaintiff in error, or had any authority from him to borrow money for him. If Norris and Wiley were partners as insisted by defendant in error, then this action cannot be maintained in a suit against one of the partners only. In the case of Sherburne v. Hyde, 185 Ill. 580 it was held, "In other states, by Statute, suits may be brought against one of several partners on a partnership contract. But not so in this state. Here all ostensible members of the co-partnership must be joined." No cause of action can be maintained under the declaration against plaintiff in error individually because he did not borrow the money, nor did he authorize the husband of defendant in error to borrow it for him as his agent. Neither can any cause of action be maintained on the theory that the husband of defendant in error was his partner because the suit is not

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brought against the partnership, the judgment is therefor reversed without a remanding order.

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GENERAL No. 6528. APRIL TERM A. D. 1916. AGENDA No. 39.

R. E. BERRY, Appellant.

vs.

W. W. BERRY, Appellee.

Appeal from Circuit Court, Christian County

202 I.A. 427

ELDREDGE, J.

R. E. Berry, by Eugene Virden, his conservator and next friend, brought suit in an action of forcible entry and detainer against W. W. Berry before a Justice of Peace to recover the possession of certain farm lands and obtained a judgment therefor. Appellee prayed an appeal to the Circuit Court but the Justice refused to approve the appeal bond, whereupon appellee sued out a writ of certiorari and brought the record of the Justice to the Circuit Court by this method. Appellant made a motion to quash the writ of certiorari which was overruled. Upon the trial in the Circuit Court appellee introduced no evidence, but at the close of appellant's evidence, made a motion to direct a verdict for appellee which the court sustained and entered judgment in favor of appellee from which this appeal is taken.

Appellant first insists that the court erred in granting the writ of certiorari and refusing to quash the same, but in our opinion, on examination of the petition for said writ,

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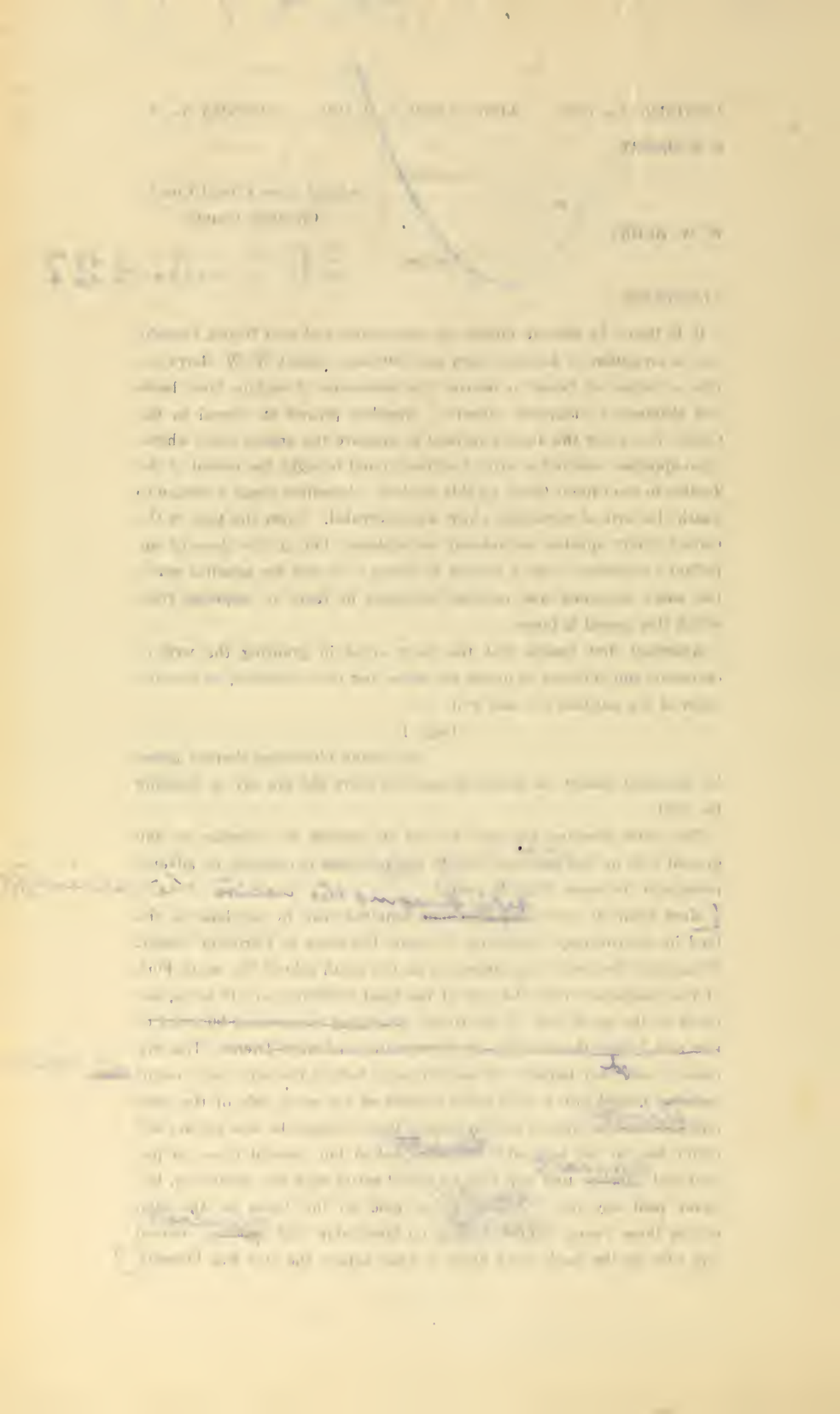
the many objections thereto urged by appellant cannot be sustained and the court did not err in granting the writ.

The court directed the jury to find its verdict for appellee on the ground that he had acquired title to the premises in question by adverse possession for more than 20 years. More than 30 years ~~ago appellant~~ before bringing the action the plaintiff acquired title by purchase to the land in controversey, consisting of about 160 acres in Christian county; 50 acres of the tract in question lies on the south side of the south Fork of the Sangamon river, the rest of the tract consisting of 110 acres, lies north of the south fork of the river. ~~Appellant is now over 90 years of age and brings this suit by his conservator and next friend.~~ The evidence shows that between 20 and 25 years before the suit was brought ~~appellee~~ the defendant moved into a little cabin located on the north side of the river and ~~appellant~~ plaintiff permitted him to remain there because he was his son and didn't like to put him off. ~~Appellant~~ Plaintiff asked him several times to pay rent and ~~appellee~~ defendant told him that he would settle with him sometime, but never paid any rent. ~~Appellant~~ Plaintiff has paid all the taxes on the land during these years. ~~Appellant~~ Plaintiff had no knowledge that ~~appellee~~ defendant claimed any title to the lands until about a year before the suit was brought.



The evidence tends to show that the only interest appellee had in the premises was that of a tenant by sufferance or at will. Where the premises owned

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by a parent are occupied by his child by permission, in order to establish title by adverse possession, there must be clear and positive proof of an open disclaimer of the title of the parent and the assertion of hostile title by the child, and the knowledge of the assertion of such hostile title must be brought home to the parent and such hostile possession and assertion of title must be continued for 20 years thereafter. Brettman vs. Fischer, 216 Ill. 142; Kirby v. Kirby, 236 Ill. 255; 2 C . J. 157. Unless these facts appear, adverse possession, no matter how long continued will not ripen into title. In the case at bar, appellee made no claim of ownership to these lands until about a year before the suit was brought.

It is insisted by appellee that the judgment should be sustained because there was no demand for possession or notice to quit served upon him before the suit was brought. No notice to quit or demand for possession is necessary where the relation of landlord and tenant does not exist or where the tenant repudiates the relationship and claims to be the owner in fee by adverse possession. Herrell vs. Sazland, 81 Ill. 457; Schonnmaker vs. Doolittle, 118 Ill. 605.

We conclude that it was error to exclude the evidence and give the directed verdict under the facts as they appear in this record. The judgment will accordingly be reversed and the cause remanded.

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GENERAL No. 6535. APRIL TERM A. D. 1916 AGENDA No. 36.

JOSEPHINE WEAKLY,

Appellee.

vs.

Appeal from Circuit Court
Shelby County.

ADOLPH G. MIZELL, et al,

Appellants

202 I.A. 429

ELDREDGE, J.

This is the second appeal of this case to this court. Appellee filed her bill in the Circuit Court of Shelby County against appellants to foreclose a mortgage. Feigned issues were made up, a trial thereof had before a jury and a decree rendered in favor of appellee, from which decree appellants prosecuted their appeal to this court which reversed the same and remanded the cause with directions to the chancellor to either set aside the verdict and grant a new trial or enter a decree based upon his independent judgment derived from the evidence. A statement of the issues and facts involved on the former appeal are set forth in the former opinion, (Weakly & Mizell, et al. 193 Ill. App. 494.) Upon the reinstatment of the cause in the court below the parties stipulated that the former decree be set aside and a new trial granted; that the chancellor should have read to him the evidence preserved in

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the certificate of evidence upon the former trial and that either party might in addition thereto present such further evidence in open court as he saw fit. No additional evidence of material importance was introduced by either party upon the last hearing before the chancellor who ~~has~~ again rendered a decree in favor of ~~appellee~~ complainant. ~~The controlling issue in the case is~~ whether appellants have paid the notes in controversey which the mortgage was given to secure. Upon this question, there is an irreconcilable conflict in the evidence, and as the chancellor, who saw and heard the witness on the former trial, has upon a reconsideration of the evidence again entered a decree, based upon his own independent judgment therefrom, in favor of appellee, this court would not be warranted in reversing the decree upon questions of fact unless the findings thereon are palpably erroneous and clearly wrong. Johnson v. Johnson, 125 Ill. 510; Baker v. Rockbrand, 118 Ill. 365; Peabody v. Kendall, 145 Ill. 519; Dowie v. Driscoll, 203 Ill. 480.

The decree must therefor be affirmed.

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GENERAL No. 6540. APRIL TERM A. D. 1916. AGENDA No. 39

FRANK T. O'HAIR & FRED RHOADES, Partners, Appellees. | Appeal from Circuit Court Edgar County.

vs.

OLIVER L. WATSON, Appellant

ELDREDGE, J.

202 I.A. 439

This is an appeal by Oliver L. Watson, appellant from a judgment for $200 recovered against him in the Circuit Court of Edgar County by the appellees, O'Hair and Rhoades, law partners, for a retaining fee.

Appellant is engaged in the real estate business in Chicago and in January 1915, exchanged with Charles Hoult a lease hold estate on North Clark street and Fullerton Avenue, Chicago, and 74 acres of land in Berrien County, Michigan, for 715 acres of farm land in Edgar county, Illinois, owned and farmed by the latter. The deed to him from Hoult was recorded in Edgar county January 25, 1915, and within a few hours thereafter judgments by confession were entered against Hoult in the Circuit Court of said county amounting to over $20,000. Among the judgment creditors were the First National Bank of Paris and The First National Bank of Christman, and on January 26, 1915, the two Banks filed their bill in the Circuit Court of Edgar County in which it was alleged

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that Hoult's conveyance to appellant was made without consideration or for an inadequate consideration while Hoult was insolvent, and the prayer for relief asked that said deed be decreed to be void as to them respectively and as to such other creditors as might thereafter intervene and become complainants. Several other creditors became parties complainant or filed intervening petitions. Appellant answered the bill through his Chicago attorney, Charles S. McNett, and denied all charges of fraud in the exchange of the properities and averred that the consideration thereof was ample. Subsequently the creditors and appellant made an agreement whereby appellant consented to reconvey to a trustee for the benefit of the creditors the land deeded to him by Hoult, in consideration that Hoult reconvey the Chicago and Michigan properities to appellant and the retention by appellant of $2900 paid by Hoult to him as part consideration in the original exchange, and the further payment to appellant of $2000 additional by the creditors. Fred Barber was designated as trustee and appellant prepared his deeds for the reconveyance of the Hoult lands to the trustee and went to Paris, Illinois, February 22, 1915. He notified Hoult and his creditors that he was ready to deliver the deeds and to receive the deeds to the Chicago and Michigan properities and the stipulated sum of $2000. For some reason unknown, some of the creditors at that time refused to carry out

the agreement, and

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appellant, believing that the deal or settlement of the transaction had failed, on February 23, went to the office of the law firm of appellees to engage their services as his attorneys to assist Mr. Charles S. McNett, his Chicago attorney, in defending against the bill. Mr. O'Hair was at that time a member of Congress and was in Washington, D. C. and appellant's conversation in regard to the matter in controversey was had with Mr. Rhoades. This conversation is the basis of the contract of retainer, and the versions thereof as given by Rhoades and appellant differ.

No further conversation was had between any of the parties, but on March 3, it appears that the settlement with the creditors was effected and the deeds from appellant to the trustee were recorded. In the meantime several of the creditors and also Hoult had sought to retain appellees in the case but the latter had refused to act as their attorneys on the ground that they had been retained by appellant.

It is first contended by appellant that there never was a contract of retainer. The only witnesses who testified on this point are Rhoades and appellant. Rhoades testified in substance that appellant agreed to employ appellees, pay a fee for retainer and such charges as might be earned in the trial of the case, provided only that Mr. O'Hair had not been retained by some other litigant in the controversey having an adverse

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interest. The testimony of appellant was to the effect that appellees were to be retained under the above condition only in case he had need of their services and if the fees were satisfactory. What the details of the contract really were was a question of fact for the jury to determine.

It is next urged that appellees cannot recover because they accepted employment from Hoult, a party to the litigation having an adverse interest. Strong v. International B. & L. Union, 183 Ill. 97. Farwell v. Great Western Tel. Co., 161 Ill. 522. Heffron v. Flower, 193 Ill. 101. Miller v. Lloyd, 181 Ill. App. 230.

Two or three days after the interview between Rhoades and appellant, Hoult consulted Rhoades and attempted to procure appellees as his attorneys in the suit. Rhoades told Hoult that his firm had been retained by appellant and they could not represent him if his interests were adverse to those of appellant. Hoult replied that they were about to settle the controversey insofar as the re-exchange of the lands from him to appellant and from appellant to the trustee was concerned, in which case, appellant would have no further interest in the matter. Rhoades replied that in that event appellees might be able to represent him. On March 3, Rhoades noticed the recording of the deed from appellant to the trustee made pursuant to the agreement between appellant and

creditors heretofore mentioned, and on March 6, having heard nothing

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further from appellant, wrote him a letter stating in substance that he had been informed that appellant had deeded the property to the trustee for the benefit of Hoult and his creditors; that his firm had been requested by some of the parties interested to represent them and containing among other things the following, "Under that condition of affairs I presume you will not need our employment and I am writing to know if that is true, and if we are at liberty to take employment from any other person who might want to employ us in this Hoult matter, also if our sevices for you are ended, would like to have you send us a fee."

Mr. O'Hair has returned from Washington, and I stated the matter to him and he thought a reasonable fee in the matter would be $250.

Please let me hear from you in reference to the matter and if our services to you are ended, please enclose draft for that amount and oblige."

On March 17, not having received any answer from appellant to this letter, Rhoades wrote another letter stating among other things that the case had not been dismissed and requested appellant to send a retainer if he further desired their services. On March 19, appellant wrote to Rhoades enclosing a copy of a letter purported to have been written by him to Rhoades on March 8 in reply to the first letter written by Rhoades which in substance stated that

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appellant was surprised at the contents of Rhoades' letter and that his purpose in calling was to see O'Hair or Rhoades and have them represent him in case he needed their services and that the sum of $250 seemed out of proportion to the amount of time consumed in that call. In reply to this letter on March 20, Rhoades wrote to appellant a lengthy letter stating all the facts as he understood them in regard to his conversation with appellant on the latter's visit to his office, and also stating the fact that Hoult had requested his firm to represent him and it had refused to do so unless his interest did not conflict with appellant's and also the following, "We think that the retainer fee of $250 is very reasonable. That is not to pay for the time you were talking to me. You certainly know more than to put it in that way. A retainer, as I understand it, is paid to prevent an attorney from taking employment on the opposite side, and by your conversation with me, you certainly lost us employment from one if not two creditors." In reply to the last letter, on March 23 appellant wrote to appellee as follows, "Your letter of the 20th received yesterday. In all probability our attorney Mr. C. S. McNett will be in Paris within the next day or two, in which case we will request that he call and see you."

It is undisputed that McNett did thereafter call upon appellees and

told them in substance that the litigation so far

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as appellant was concerned was settled, that appellant was out of the case and had no further need of the services of appellees. Rhoades testified that it was not until about a month after this conversation with McNett that appellees acted as attorneys for Hoult. Whether this is a fact or not was also a question for the jury to determine. While the rule is a rigid one, that attorneys at law cannot accept employment from adverse litigants at the same time and in the same controversey, it would be manifestly unfair and unjust if an attorney after having been retained by a litigant, and after the litigant's interest in the matter had been supposedly concluded and disposed of and the attorney discharged by the litigant from performing any further services for him, to prevent the attorney from collecting a retaining fee, because he should thereafter represent some other party in the litigation. We know of no rule of law or ethics supporting this contention.

Complaint is also made that the trial court erred in too closely restricting appellant in his cross examination of certain witnesses who testified that $500 would be a reasonable, ordinary and usual retainer fee for appellees in the case in question. While we are of the opinion that the court might properly have permitted the witness to have answered some of

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the questions complained of, yet the error, if any, was apparently harmless for the jury allowed by the verdict but $200 damages.

It is insisted that the following instruction given on behalf of appellees is erroneous. "The court instructs the jury, that the plaintiffs claim in this case that they were employed by the defendant, in certain litigation which the defendant heretofore had, as his attorneys to represent him in such litigation, and that after such employment, the defendant, on his own account, settled and adjusted his litigation, and discharged the plaintiffs from further employment as his attorneys in such legal matters, and refused to pay the plaintiffs anything for retaining their services as attorneys in such legal matters. You are further instructed, that if you find from a preponderance of the evidence, that the plaintiffs were practicing attorneys, and were employed by the defendant to perform legal services for him, and that the plaintiffs stood ready, willing and able to perform such services at all proper times when the same should have been performed, then the defendant would be liable to the plaintiffs for retaining their services in whatever amount you find from a preponderance of the evidence the retaining of the plaintiffs' services was worth."

The criticism extended to this instruction, as we understand counsel's argument, is that there must be an express

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stipulation that a retaining fee is to be paid to support a recovery therefor. We believe that the rule announced in the instruction is supported by the great weight of authority. 6 C. J. 720, and cases cited. Moreover, an instruction as to the law in any particular case must be applicable to the facts proven therein and this instruction is correct as applied to the evidence in this case adduced on behalf of appellees.

The criticisms of the other instruction given on behalf of appellees we do not think can be sustained.

The refusal of the court to give certain instructions on behalf of appellant is also assigned as error. The principals of law announced in such refused instructions are contained in those given.

There being no reversable error in the record the judgment is affirmed.

GENERAL No. 6543. APRIL TERM, A. D. 1916. AGENDA No. 75

BLACKMER and POST PIPE CO.
Appellant.
vs.
R. E. ~~GOODMAN~~ and J. W. RYAN,
Partners,
Appellees.

Appeal from Circuit Court
Vermilion County

202 I.A. 441

ELDREDGE, J.

Appellees were co-partners and had acquired a contract from the city of Altamont, Ill. for the construction of a sewer. They purchased the sewer pipe from appellant and on March 1, 1913 were indebted to appellant for the sum of $2001.45. In an attempted settlement of this account appellees gave to appellant, on May 17, 1913, a written order on the city of Altamont to pay to appellant, all the money due them from the city on the sewer contract. Appellant received on this order from the city $1359.48 which together with a few other small items of credit left a balance due to appellants of $559.53. Appellant brought suit to recover this amount, and appellees filed pleas of accord and satisfaction and claimed in the court below that the giving of the order on the city was a complete settlement and satisfaction of their debt to appellant. The jury rendered a verdict in favor of appellees on which the judgment was entered from which this appeal is prosecuted.

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Appellees have filed no briefs and under the rules of this court the judgment may be reversed **pro forma** but we have concluded to decide the case upon the merits.

The clear and manifest weight of the evidence is that the giving of the order on the city never was intended to be an accord and satisfaction of the debt. On June 16, 1913, which was after they had received the order, appellees wrote a letter to ~~appellant~~ plaintiff asking it to send to ~~appellees~~ them a bill for the balance which they owed it and stating that they would pay the same as soon as they could; that they expected a settlement of their work ~~in Hamilton~~ any day and could then send the balance of their bill. ~~On July 22, 1913~~ Later they signed a written statement of their own account with ~~appellant~~ plaintiff wherein they acknowledged that the sum of $559.53 was due. The verdict in this case is a miscarriage of justice and a new trial should have been granted.

The judgment is reversed and the cause remanded.

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the sum sued for

GENERAL No. 6549. APRIL TERM A.D. 1916. AGENDA No. 45

WILLIAM HOWELL,

Appellee.

vs.

CITY OF GILLESPIE

Appellant.

Appeal from County Court of Macoupin County

202 I.A. 447

ELDREDGE, J.

Appellee sued appellant before a Justice of Peace to recover salary due him as City Marshall of the city of Gillespie, for the period from June 15, 1914 to July 22, 1914, and recovered a judgment for $81.50. Appellant appealed from this judgment to the County Court of Macoupin County, where a trial was had before the court without a jury, and in the latter court judgment was entered against appellant for sum of $80, and provided that an execution shall issue therefor.

Appellant was appointed City Marshall of the City of Gillespie in May 1914, and on June 19 following, he went to St. Louis and without notice to the Mayor or other city authorities, put another man in his place to act for him as City Marshall during his absence. On June 20, 1914, the Mayor wrote a letter to appellee as follows,

"Gillespie, Illinois, 6-20, 1914.

Wm. Howell,
City Marshall,

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City.

Dear Sir:—Your services is no longer desired on the police force by me.

You will please send in your resignation to me immediately. It will make it better for us.

I have filed charges with the City Clerk but will withdraw them if you will turn over all keys of the City, etc. to me.

Truly yours,
Bert Rice, Mayor."

On Monday morning June 22, appellant went to the office of the City Clerk and delivered to him his star, keys, revolver, pair of handcuffs and all other property belonging to the city which he had possession of by virtue of his office and did not again attempt to act as City Marshall. Appellant now claims that he did not resign his office pursuant to the request contained in the Mayor's letter, but is still City Marshall and entitled to the salary of the office which was at the rate of $75 per month. A resignation of a public office may be either express or by implication, 29 Cyc. 1404. His conduct in surrendering the insignia of his office and the property of the city in his possession after receiving the Mayor's letter, and no attempt thereafter on his part to preform the duties of said office, was a resignation of the office. The evidence shows that his salary had been paid in full up to June 15th, 1914, and it follows therefor that he was entitled to salary only from that date to June 22nd, 1914.

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It is reversable error, in rendering judgment against a municipal

corporation to award an execution therefor against it. City of Bloomington v. Brokaw & Gregory, 77 Ill. 194; Village of Kansas v. Juntjen, 84 Ill. 360; City of Paris v. Cracraft, 85 Ill. 294.

The judgment is reversed and cause remanded with directions to the trial court to enter judgment in favor of appellee and against appellant for the amount of salary due appellee which had accrued from June 15, 1914 to June 22, 1914 and costs. The costs in this court are taxed to appellee.

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2301

GENERAL No. 6552. APRIL TERM A. D. 1916. AGENDA No. 48

I. J. BROOKS, Appellee.

vs.

CHARLES L. LAWS, Appellant

Appeal from Circuit Court, Montgomery County

202 I.A. 448

ELDREDGE, J.

Appellee procured a judgment against appellant in an action of assumpsit based upon a promissory note dated August 31, 1912 for the principal sum of $1000 due one year after date with interest at the rate of 7 per cent per annum and payable to the order of appellee and his wife, Mary C. Brooks. J. L. Traylor was the principal on the note, and it was also signed by C. A. Traylor, A. E. Traylor, C. F. Edwards and Charles L. Laws as sureties. This suit was brought against appellant Laws alone. The note when it was executed bore 6 1-2 interest but about two years later, the figures "6 1-2" were stricken out and the word "seven" was written above them.

The defenses relied upon at the trial were, ~~(1)~~ that the note had been materially altered with the consent of ~~appellee~~ Mary and without the knowledge or consent of ~~appellant who was but a surety thereon~~ defendant and ~~(2)~~ that the note had been extended for a

~~(Page 1)~~

definite period of time and for a valuable consideration without the knowledge or consent of ~~appellant.~~ defendant It is contended by appellee that the note was altered without his knowledge and that he never made such an agreement for the extension of the time of payment as would absolve from liability the surety thereon; and also, that even if these defects in the note complained of were established, yet appellant would still be liable because after the same came to his knowledge he made a new promise to pay the note.

The loan was originally procured by paying appellee $10 as a premium or bonus. The note first became due August 31, 1913 at which time J. L Traylor, the principal, paid $65 accured interest and the note was renewed another year upon Traylor paying another bonus of $10. The note next became due in August, 1914 and appellee went to the office of said Traylor to collect the note and interest. Traylor testified that he asked appellee to renew the note for another year; that appellee stated in substance that he would renew it upon the same terms as before but it was the only note he had which bore less than 7 per cent interest and he would have to have a raise in the interest; that he then told appellee that he would see appellant and his brother and get a new note bearing 7 per cent interest but appellee told him that that would not be necessary

but for him to just change the rate on the note from 6 1-2 to 7 per cent; that thereupon he, Traylor, struck out the figures 6 1-2 with a pen and wrote over the same, the word seven; that he then gave appellee his check for $75 which included $65 for the interest which had accrued and $10 as a bonus for the extension of the note for another year. Appellee took the check, and a few days later it was cashed by his wife. Appellee testified that he could neither read nor write, that he said nothing to Traylor about changing the rate of interest in the note and gave him no authority to do so and did not know that the change had been made, though he does admit that he told Traylor that it was the only note he had, except those given to his children, which did not draw 7 per cent interest. Traylor's testimony is corroborated by Mansfield, cashier of the State bank at Donellson, who testified that appellee told him that he went to Traylor's office to collect the interest and told Traylor he would have to have a higher rate of interest and that he suggested making out a new note, but Traylor told him to change the rate of interest on the old one. The witness Barringer, cashier of the Montgomery County Loan and Trust Company, testified that appellee told him that when he went to collect the interest on his note, he told Traylor he was getting 7 per cent on his other notes, and that he handed the note to

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Traylor who took the note back to his desk, brought it back and gave it to him and said he would make the rate of interest right when he asked for an increase. Hicks testified that he was in Traylor's office at the time appellee had the note there and heard him tell Taylor that he would have to have 7 per cent. From all this testimony on this subject it is apparent that the subject of the note drawing 7 per cent interest was talked of in the conversation between appellee and Traylor, and it is unreasonable to presume that Traylor without the request and without the knowledge or consent of appellee would voluntarily increase his liability on the note by raising the rate of interest to 7 per cent.

In regard to the agreement to extend the note for another year, appellee testified that he said nothing about the matter, but he makes no explanation whatever why the check given to him by Traylor was for $75, a sum $10 in excess of the amount due for the accrued interest on the note up to that time, except to say that he did not know the check was for that amount as he could not read, and that when his wife cashed the check she only gave him $32.50 as his share of the interest on the note. We think the testimony of Traylor is strongly corrobrated by his check, as it is again unreasonable to presume that he would pay

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appellee $10 more than was necessary without any reason therefor. After a careful consideration of all the evidence in the case, in our opinion the manifest weight thereof is to the effect that the alteration of the note was made

with the consent and knowledge of appellee and the time of payment of the note was extended by him for the definite period of time of one year for the consideration of $10.

But it is contended that if it be conceded that the above conclusions of fact are true, yet appellant is still liable on the note because, after having obtained full knowledge of these facts, he promised to pay the debt. The only evidence which it is claimed supports such promise is found in the testimony of appellee and his daughter. Appellee testified that as a result of a telephonic communication between him and appellant, the latter came to his home and his account of what was said in this connection in substance, is as follows: "Then he said he wanted to do what was right. I told him that was all I wanted anybody to do. He said he was willing to pay his part of the note, I asked him what his part was. He said, well, if there were 5 on the note, one-fifth would be his part. I told him the other parties were not worth anything. Mr. Laws never told me that he was gong to pay the note." Ada Brooks, daughter of

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appellee, testified in substance: "Mr. Laws asked papa to see the note; father presented it and Mr. Laws looked at the note and said that was the note, but the face of the note had been changed. Mr. Laws said he was willing to do what was right. Mr. Laws said one-fourth was his part, papa said the rest are no good and your part is all."

The promise by which a discharged debt is revived must be clear, distinct and unequivocal. The mere recognition or acknowledgement of such a debt does not create a legal obligation to pay it. There must be an express promise to pay the debt, and even the payment of part of the principal or of the interest thereon, without such express promise, will not revive the obligation St. John vs. Stephenson, 90 Ill. 82. It would take a most strained construction to convert the above conversation into a promise to pay the note. If appellant was liable to appellee on this note at all, he was liable for the full amount thereof. In the language above quoted, he no where states that he promised to pay this note, but simply that he was willing to do what was right and pay one-fourth or one-fifth thereof. The reasonable inference from the language used is that appellant was willing to compromise the matter by paying one-fourth or one-fifth part of the debt but which offer appellee refused to accept.

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Having held that appellant did not make a new promise to pay the debt, the question whether such promise was supported by a new consideration, need not be determined.

The judgment is reversed with the following finding of facts. (1) The note was materially altered with the consent and knowledge of appellee and without the knowledge of appellant. (2) The note was extended for a definite period of time for a valuable consideration with the knowledge and consent of appellee and without the consent or knowledge of appellant. (3) Appellant made no new promise to pay the debt after he obtained knowledge of said alteration and extension.

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GENERAL No. 6560. APRIL TERM A. D. 1916. AGENDA No. 51

M. E. SCARLETT and GEORGE THOMAS,
Appellees,
vs.
NATIONAL LIVE STOCK INSURANCE COMPANY,
Appellant.

Appeal from Circuit Court, Vermilion County

202 I.A. 450

ELDREDGE, J.

This is an action of assumpsit brought by appellees against appellant on a policy of insurance issued by appellant to indemnify appellees in the sum of $1000.00 against loss of a stallion named Royal Defiance, by death, accident, disease, theft or fire. Appellee recovered a judgment for the sum of $1100 to reverse which this appeal is prosecuted.

This case is before us for the second time, the judgment in the former case having been reversed for error in the giving of a certain instruction. (Scarlett et al. vs. National Life Ins. Co., 193 Ill. App. 488.) Many of the alleged errors urged on this appeal have been passed upon in our former opinion and need not be again discussed as they are **res adjudicata**

The application for the policy was procured by

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appellant's agent, Zea, and the defenses relied upon are that appellees made false statements in the application which were warranties, in consequence of which the policy became void. The contention of appellees is that they answered all the questions in the application truthfully but that the agent inserted false answers, and on the first trial appellees so testified. The agent on the first trial testified as a witness but did not deny the testimony of appellees that they gave truthful answers and that he wrote in false ones. On the last trial the agent was dead and the court refused to permit appellees to testify to any conversations had with him, but allowed them to testify that they did not know what answers were put down by Zea; that they first learned what answers were in the application at the time of the former trial; and that they did not read the answers. It is now contended on this appeal, that it was error for the court to admit such testimony, for the reason that in testifying to such facts such evidence tended to prove conversations with the agent. Previous to July 1, 1899, Sec. 4 of Chapter 51 (Hurds R. S. 1911) provided that in every action a party to the same who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness to any conversation or **transaction** between himself and such agent. On the date mentioned

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the present statute went into effect and the words "admission or conversation" were substituted for the words "conversation or transaction." Since this amendment to the statute

207 Dec 2, 1916

2303

GENERAL No. 6563. APRIL TERM A. D. 1916. AGENDA No. 54

THE TOWN OF POLK, Appellee.

vs.

ALBERT E. GHENT, Appellant.

Appeal from Circuit Court Macoupin County.

202 I.A. 451

ELDREDGE, J.

[Defendant ~~Appellant~~ owned a 40 acre tract of land in Polk Twp. Macoupin County, and for many years a public highway, created by prescription, angled across the north portion thereof. He and eleven others petitioned the highway commissioners to change the location of the road so that it would run directly across the north portion of the tract along the section line. The commissioners granted the petition and ~~appellant~~ defendant deeded to them the north 20 feet of his ground and purchased for them the south 20 feet of the tract of land immediately north of his land, the purpose being to make the road 40 feet wide. After the new highway was laid out ~~appellant~~ defendant fenced up the portion of the old highway which had run diagonally across his land. It appears that the new highway was impassable because nothing was done towards making it fit for use for public travel. It ran over a steep hill and the stumps and other obstructions had not been removed

~~(Page 1)~~

therefrom. The commissioners claimed that it was a part of the agreement between them and ~~appellant~~ defendant, that ~~appellant~~ he would put the new road in a passable condition, while ~~appellant~~ he denied that he ever made such an agreement. No steps were ever taken to vacate the old highway. The town of Polk brought this suit against appellant before a justice of peace to recover a penalty for obstructing a public highway. On appeal to the Circuit Court the case was tried before the court without a jury and a fine of $3 and costs imposed against him.

A public highway can only be vacated in the manner provided by statute and the commissioners of highways had no power to bargain with appellant to close up the old highway and open a new one in exchange therefor. A public highway belongs to the public and it cannot be vacated or closed to the public use except in accordance with the methods provided by law, and until this highway had been lawfully vacated appellant had no right to close it up. No agreement or contract he may have made with the highway commissioners can be a defense for such action on his part, no matter how innocent he may have acted in the matter. Town of Rice, vs. C. D. & M. R'y. Co., 30 Ill. App. 481, and case cited.

There being no error in the record the judgment must be affirmed.

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GENERAL No. 6574. APRIL TERM A. D. 1916. AGENDA No. 63

IN THE MATTER OF THE ESTATE OF SARAH BAKER, DECEASED,
EDWARD ALLEN et al.
Appellees.
vs.
JAMES M. BAKER, ADMINISTRATOR,
Appellant.

Appeal from Circuit Court, Morgan County

ELDREDGE, J.

202 I.A. 463

Sarah Baker died in September 1914, and the appellant, James M. Baker, on his own petition was appointed administrator of her estate. Edward Allen and James Ledferd are grand children and heirs of said Sarah Baker, and at the February term 1915, of the County Court of Morgan County, filed a petition for citation against appellant as administrator of said estate, asking that he be compelled by the court to inventory a large amount of personal assets of the estate in his possession and not accounted for. Upon a hearing upon this petition the County Court on Feb. 5, 1915 entered an order directing appellant to inventory and charge himself with $2566.34 funds belonging to the estate. From this order appellant prayed an appeal to the Circuit Court but never perfected the same. Subsequently, upon a hearing in the Probate Court, attorneys fees to the amount of $175 were allowed against the estate for the services of the

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attorneys for the petitioners and which amount appellant was directed to pay. On February 13, 1915, appellant filed a supplemental inventory charging himself with said sum of $2566.34 with the notation, "For which amount the said James M. Baker claims he is not justly indebted to the said estate." At the November term, 1915, of the County Court appellant filed his final report as such administrator and omitted therein to charge himself with said sum of $2566.34 and omitted any reference to the sum of $175 attorneys fees. Appellees filed objections to this report which were sustained, and an order entered directing appellant to recast and restate his final report and, among other things, to charge himself with the amount above mentioned, that he pay said sum of $175 allowed for attorneys fees and to file his final report within 30 days. From this order of the County Court, appellant perfected an appeal to the Circuit Court where the order of the County Court was affirmed. No questions had been raised in this Court in regard to the $175 allowed as attorney's fees.

It is first insisted that the order of the County Court entered on the hearing on the petition for citation wherein appellant was ordered to charge himself with the sum of $2566.34, was void, for the reason that he was entitled to have that matter heard by a jury. It must now be conceded that the practise to compel an executor or administrator by cita-

tion to inventory and account for assets in his possession belonging to the estate

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of which he is such executor or administrator by virtue of Sections 81 and 82 of the Administration Act, is proper procedure, ~~that it~~ is equitable in its nature and the parties thereto are not ~~entitled~~ to a jury trial. Martin v. Martin, 170 Ill. 18; Dinsmore v. Dressler, 164 Ill. 211; Coffey v. Coffey, 179 Ill. 285; Platt v. Williams, 175 Ill. App. 1.

On the hearing in the Circuit Court appellant filed a petition in which he requested his final report be changed to a report current, that he be permitted to resign as administrator and that a new administrator be appointed so that he could have a trial by jury on the question whether he was indebted to the estate. The court refused to permit him to resign and this action is also assigned as error. The order of the County Court on the hearing of the petition for citation was a final judgment rendered in a proceeding in which the court had jurisdiction of the person and the subject matter. Martin v. Martin, **supra.** No appeal was ever perfected or prosecuted from this final judgment which was an adjudication as to his liability to the estate and the Circuit Court had no power to release him from it by permitting him to resign and again try that issue before a jury.

There being no error in the record the judgment is affirmed.

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2306

GENERAL No. 6577. APRIL TERM A. D. 1916. AGENDA No. 66

DAVID A. DEVARES,

Appellee.

vs.

FRANK A. COREA,

Appellant.

Appeal from Circuit Court, Sangamon County

202 Ill. 465

ELDREDGE, J.

This is an appeal from a judgment in favor of appellee in an action of forcible entry and detainer commenced originally before a Justice of the Peace and heard in the Circuit Court on appeal. On July 1, 1910, ~~appellee~~ plaintiff agreed to sell to ~~appellant~~ defendant and ~~appellant~~ defendant agreed to buy lot 5, block 6, in B. S. Edwards 3rd addition to the City of Springfield, Illinois, for the sum of $2100, payments to be made at the rate of $12 per month. Pursuant to said agreement, ~~appellee~~ plaintiff caused his daughter to write in a book the following memorandum:

"ARTICLES OF AGREEMENTS.

Entered into on the first day of July, 1910, between David A. DeVares of the County of Sangamon and State of Illinois, party of the first part, and Frank A. Corea of the City of Springfield, County of Sangamon and State of Illinois, party of the second part as follows:

(Page 1)

The said David A. DeVares, party of the first part, for the consideration hereinafter mentioned, does for himself and for his heirs convenant and agrees with the said Frank A. Corea, party of the second part, and his heirs and assigns, by these presents, he, said party of the first part, shall and will agree to sell lot 5, block 6, in B. S. Edwards' 3rd addition to the City of Springfield, Illinois, for the sum of twenty-one hundred ($2100.00) dollars. 1910 payments to begin in July."

~~Appellant~~ defendant took possession of the property and on July 9, 1910, made the first payment, the receipt for which is as follows,

July 9th, 1910.

Received of Mr. Frank Corea Twelve Dollars to apply as 1st cash payment on the Brick Flats on Clay Street.

$12.00 D. A. DeVares."

Up to the time of bringing suit, ~~appellant~~ defendant had paid under this contract $809.40 and as the payments were made, they were credited upon the book by ~~appellee~~ plaintiff. On September 10, 1915, ~~appellee~~ plaintiff caused to be served upon ~~appellant~~ defendant, the following written demand:

"Springfield, Illinois, September 10, 1915.

To Frank A. Corea:

I hereby demand that you surrender to me possession of the

(Page 2)

following described real estate, situated in the City of Springfield, County of Sangamon, and State of Illinois, to-wit:

Lot Five, Block Six, in B. S. Edwards' third addition to the City of Springfield, Illinois,

possession to which said land was acquired by you under and by virtue of a contract executed by David A. DeVares and Frank A. Corea, and having failed and neglected to perform the conditions in said contract on your part, to be preformed, your rights to the possession of real estate being thereby forfeited under said contract.

David A. DeVares."

It was contended by appellee in the court below and is urged here, that while the memorandum does not say anything about the payment of interest on the deferred payments, yet such was the intention and agree-

ment of the parties, and that appellant having failed to make any payment of interest he was in default under the contract; that if interest be computed there was a balance due of $483.53 at the time the suit was commenced. It is conceded that if interest is not chargable, appellant at that time had paid more than there was due and was not in default in any of his payments. The contract is a written one and does not provide for the payment of any interest. It is well settled in

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this state that interest cannot be read in to a contract where there is no provision therefor, unless there is a statute authorizing it. Fowler vs. Harts, 149 Ill., 592; A. T. & S. F. R'y Co., vs. C. & W. I. R. R. Co. 162 Ill., 632. There was consequently no default in the payments on the part of appellant.

It is next insisted that the contract is void under the statute of frauds, (1st.) because it is not signed by appellant and (2nd.) because it does not state how much shall be paid each month.

Appellee directed his daughter to write out the memorandum at his direction and this memorandum states "Articles of Agreements. Entered into on the first day of July, 1910, between David A. DeVares of the County of Sangamon and State of Illinois, party of the first part. and Frank A. Corea of the City of Springfield, County of Sangamon and State of Illinois, party of the second part as follows:

The said David A. DeVares, party of the first part, for the consideration hereinafter mentioned does for himself and for his heirs covenant and agrees with the said Frank A. Corea, party of the second part, and his heirs and assigns, by these presents, he, said party of the first part, shall and will agree to sell

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lot 5, block 6, in B. S. Edwards' 3rd addition to the City of Springfield, Illinois, for the sum of twenty-one hundred ($2100.00) dollars. 1910 payments to begin in July."

To take a contract out of the statute of frauds it is not necessary that the signatures of the parties shall be attached to the bottom thereof unless the statute provides that they shall be "subscribed thereto." If they appear anywhere in the instrument so long as they are the signatures of the parties, it is sufficient. In the case of McConnell vs. Brillhart, 17 Ill., 354, the court held, "4. The party to be charged, or vendor of land, &c., or his lawfully authorized agent, shall sign it.

5. A verbal or parol agency is sufficient for this purpose. Doty vs. Wilder, 15 Ill., R. 407; Johnson vs. Dodge, 17 Ill. R., post; Clinan vs. Cooke, 1 Sch. and Leff. R. 31.

6. The signing will be sufficient in the caption, or body of the memorandum, or by a subscription to it. 10 Ohio R. 402; 1 Pet. R. 647, 650." And such is the apparent weight of authority, 20 Cyc. 274 and cases cited. By directing his daughter to write his name in the contract, it became appellee's own signature.

No form of language is necessary in order to determine

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what sort of writing is sufficient to meet the requirments of the statute, if only the intention can be gathered, and any kind of writing, including hasty notes or memoranda in books, papers letters and telegrams suffice, if they contain on their face or by reference to others, the names of the parties, a sufficient explicit description of the property to render it capable of being indentified, together with the terms and conditions of the contract. Koenig vs. Dohn, 209 Ill., 468. If it should be deemed that the original articles of agreement does not bear the signature of appellee, still that memorandum and the receipt would comprise a complete contract, as the receipt contains all the elements of the contract except the consideration, which was shown by the contract and which under the statute may be proven by parole. Ullsperger vs. Meyer, 217 Ill. 262.

The demand for possession, also signed by appellee, refers to the articles of agreement or memorandum as a contract executed by himself and appellant and admits by this language that the memorandum was executed or signed by him.

In our opinion the evidence tended to show a valid contract for the sale of the real estate mentioned therein and that appellant was not in default under the terms thereof. The judgment is therefor reversed.

Dec 2, 1916

2307

GENERAL No. 6580. APRIL TERM, A. D. 1916. AGENDA No. 69.

W. B. McBRIDE,

Appellee.

vs.

ASSUMPTION TELEPHONE COMPANY,

Appellant.

Appeal from Circuit Court, Christian County

202 I.A. 468

ELDREDGE, J.

On June 26, 1915, appellee brought suit against appellant in an action on the case to recover damages for the death of a horse alleged to have been caused by appellant's negligence, and recovered a judgment for $200, to reverse which this appeal is prosecuted.

Appellant owned and controlled a telephone line running from the village of Assumption, to the city of Taylorville, in Christian county. The line ran along the highway in front of a pasture in which was appellee's horse. The negligence charged in the declaration is, that appellant placed or permitted a wire to become loose and sag to such an extent that stock traveling underneath would become tangled, get caught and injure themselves, which was known by the defendant, or by the exercise of reasonable care could have been known, and that the horse of appellee on the 27th day of June, 1910, did become entangled in the wire resulting in cuts and bruises to such an extent that the horse thereafter died. Appellant filed the plea of general issue and

(Page 1)

a plea of the statute of limitations.

The evidence tends to show that a wire attached to one of the poles on the highway extended over the fence in to the pasture and along the ground therein; that it had been placed on the pole a number of years before by the Christian County Telephone Co. with the acquiescence of appellant, and was an abandoned wire and not the property of appellant. Appellant contends that these facts show a fatal variance from the allegations in the declaration. Regardless of the question as to whether this wire, having been allowed by the appellant to remain attached to one of its poles for a long period of time after the use of its poles by the Christian County Telephone Co. had ceased would not be, as to third persons, determined to be the property of appellant, a complete answer to this objection is that on the trial the variance was not specifically pointed out. At the close of appellee's evidence, appellant made a motion to exclude the evidence and instruct the jury to find it not guilty on the ground, among other reasons, that there was a variance between the proofs and the allegations in the declaration, but in what the variance consisted was not indicated. The variance should have been pointed out. I. C. R. R. Co. vs. Behrens, 208 Ill. 20; Probst Construction Co. vs. Foley, 166 Ill. 31; Carney vs. Marquette Coal Mining Co. 260 Ill. 220.

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In the Behrens case **supra,** the court said, "A motion to instruct the jury to find for the defendant on the ground of a variance between the pleadings and the evidence, is not sufficient to raise the question of variance, unless the defendant, by its motion, indicates specifically in what the variance consists, so as to enable the court to pass upon it intelligently, and also to enable the plaintiff to so amend his declaration as to make it conform to the evidence."

The suit was brought one day before the action would have been barred by the statute of limitations and it insisted that the evidence does show that the statute had run against the cause of action, but the veterinary surgeon who was called to attend the horse on the day of the accident, testified that the accident occured on June 27, 1910 as alleged in the declaration, and is corroborated by the charges in his books of account made on that day. In any event this was a question of fact for the jury to determine from all the evidence. The jury was fully instructed in regard to the statute of limitations and its verdict has determined this and all other questions of fact.

We do not think that the criticisms of the instructions given on behalf of appellee can be sustained and there being no reversable error in the record the judgment is affirmed.

2307

GENERAL No. 6447. APRIL TERM, A. D. 1916. AGENDA No. 2.

CLINTON E. GRAVES and CHARLES F. HURBURGH, Co-partners doing business under the firm name and style of GRAVES & HURBURGH, For the use, Etc.
Plaintiffs in Error.
vs.
TOLEDO, PEORIA & WESTERN RAILWAY COMPANY, A Corporation.
Defendant in Error.

Writ of Error to McLean County Circuit Court

202 I.A. 478

GRAVES, J.

On the right of way of defendant in error at Weston, Illinois, there was located a grain elevator. The record does not definitely disclose who was originally the owner or owners of this elevator nor is it material to the questions here involved. It is certain, however, that it was not owned by defendant in error and that it was maintained there under a ground lease from defendant in error to one F. L. Churchill who is described therein as a "tennant at will," and who contracted to pay $5.00 per annum as rental for the ground occupied under the lease. For a number of years prior to August 1, 1912, this elevator had been occupied by Churchill, who was in some way associated in the grain business there with S. C. Bartlett & Co. of Peoria. Clinton E. Graves, one of the plaintiffs in error, worked for Churchill and the Bartletts for some time prior to August 1, 1912, as their local manager. On August 1, 1912, after considerable negotiations, an agreement was made by Churchill with Clinton E. Graves and Charles

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F. Hurburgh for the sale to them of this elevator ,and they on that date went into possession of the same and thereafter conducted the grain business therein with the apparent knowledge and acquiescence of defendant in error, at least no notice to terminate the tenancy, such as is provided for by the terms of the lease to Churchill was given, and defendant in error is here insisting that plaintiff in error is in possession under and is bound by the terms of that lease. The consideration for the sale was $6000, of which Graves was to and did pay $2000, and Hurburgh was to pay $4000 by notes secured by mortgage. The notes were duly delivered, but the mortgage securing the same was not recorded. The books of C. S. Bartlett & Co. of Peoria showed on October 10, 1912 a charge against Graves and Hurburgh of $6000 the full consideration for the sale of the elevator and a credit of $2000 cash and of $4000 in notes, thereby balancing the account.

Upon taking possession of the elevator on August 1, 1912, plaintiffs in error began buying oats and storing them in the elevator.

On October 20, 1912, the elevator was burned and with it a large amount of oats belonging to plaintiffs in error was destroyed, and certain insurance companies paid to plaintiffs in error $13,000, as a fire loss and

took all the salvage of the oats. This suit is brought in the name of plaintiffs in error for the use of the insurance companies who paid the loss, on the theory that the fire was caused by sparks emitted from a locomotive engine through some negli-

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gence in failing to have such locomotive properly equipped with proper spark arresting devices; in permitting such devices to become out of repair and in the management of the locomotive.

Defendant in error denies that it was guilty of any of the acts of negligence charged and moreover says that even if it was so negligent, plaintiffs in error were the owners of the building in which the oats were stored and that they are bound by the terms of the lease of the ground on which the building stood, in which lease the lessee agreed to waive all claims and demands against the lessor (defendant in error) for damages on account of injuries to said elevator and its contents, caused by the lessor or any of its employees, and to assume all risk of fire originating from the locomotives of defendant in error.

To this last contention plaintiffs in error reply that they were not the owners of the elevator but were merely occupying the same as licensees.

The case was tried by the court without a jury. The finding of the Court was for the defendants in error and a judgment was entered against plaintiffs in error in bar of their action and for costs.

The Court found that plaintiffs in error had previous to the fire purchased the elevator in question and that at the time of the fire they were the owners and in possession of the same. An enumeration of the various items of evidence in this record tending to

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support that finding would be useless. It is sufficient to say that the clear preponderance of the evidence is in accord with that finding.

Plaintiffs in error having purchased the building, knowing it was on the right of way of defendant in error must be presumed to know not only that it was there under some arrangement, either expressed or implied, between defendant in error and the former owner of the building, but what that arrangement was. **Large v. Wabash R. R. Co.** 168 Ill. App. 310.

Defendant in error was under no legal obligation to permit the elevator to be placed on its right of way and had a right to exact such terms and conditions as it saw fit to impose as a basis of permitting it to be so placed there. **Checkley v. I. C. R. R. Co.** 257 Ill. 491. **Same case** 171 Ill. App 203. **Large v. Wabash R. R. Co.** 168 Ill. App. 310.

The stipulation in the lease of the ground on which the elevator in question in this case stood exempting defendant in error from liability for loss by the lessee, caused by the lessor or any of its employees and by

fire originating from its locomotives, was a valid and enforcible contract. Checkley v. I. C. R. R. Co. 257 Ill. 491, and numerous cases there cited.

Plaintiffs in error being the purchasers of the elevator building and in possession of the same, were bound by the terms of the lease of the ground upon which it stood. **Large v. Wabash R. R. Co.** 168 Ill. 310, **Surface v. C. M. & St. P. Ry. Co.** 191 Ill. App. 261. 24 Cyc. 986.

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As the terms of the lease are explicit and exempt defendant in error from liability for loss of the elevator or its contents caused by defendant in error or any of its employees or by fire originating from its engines or locomotives, and as such terms of the lease are binding and enforcible against the lessee and his assigns, it follows that plaintiffs in error have failed to make a case entitling them to recover.

Complaint is made of the rulings of the trial court on the admission and exclusion of evidence and in holding and refusing of propositions of law and findings of fact.

Substantially all the questions involved in these rulings turned on the propositions of law and fact above discussed and were in accord therewith. Such as involve different questions are without merit.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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Dec 2, 1916

2310

GENERAL No. 6481. APRIL TERM, 1916. AGENDA No. 5.

WILBERT ROBERTS,
Appellee.

vs.

CLEVELAND, CINCINNATI, CHICAGO & St. LOUIS RAILWAY COMPANY
Appellant.

Appeal from the Circuit Court of Edgar County.

202 I.A. 480

GRAVES, J.

This is an appeal by the defendant from a judgment against it for $4,500 in an action for personal injuries brought under the federal Employers' Liabilities act. Appellant is a railroad corporation. ~~Appellee~~ was one of ~~its~~ employes, who, with fifty or more others, were conveyed by ~~appellant~~ daily between their homes at or near Evansville, Indiana, and the place where the work they were engaged in was being prosecuted. ~~He was a boy under twenty years of age.~~ The conveyance employed on the day in question to transport these laborers was a locomotive, to the rear end of which was attached a tender and to the front end of which one coach was attached, the engine being run back-

~~(Page 1)~~

ward, pushing the tender and pulling the coach. It was being run by a man who was not a regular engineer and who had never run this engine over this track before. This ~~appellee~~ did not know. There ~~is~~ some evidence tending to show that when ~~appellee~~ and his co-laborers boarded the conveyance on the day in question the acting engineer invited ~~appellee~~ to get into the cab of the engine. ~~Be that as it may~~, he ~~did~~ got into it and was riding there when the accident occured, and there ~~is~~ evidence tending to show he had ridden there several times before, and that others frequently rode there. There ~~is~~ also evidence tending to show that at a point about a half mile south of the town of Cynthiana, Indiana, there was a place in the roadbed where the ground was spongy and soft, the ties defective and rotten, and the joints of the rails uneven and out of alignment. This ~~appellee~~ did not know. When the train reached this place the tender and locomotive left the track and turned over, injuring ~~appellee~~. There ~~is~~ also evidence tending to show that this engine was being run at an excessive rate of speed in view of the condition of the roadbed there.

~~(Page 2)~~

~~Appellee~~ urges as reasons why ~~this~~ cause should be reversed that ~~appellee~~ has neither by his declaration nor his proof shown a right to be in the cab of the engine; that both the declaration and proof show that ~~appellee~~ was a trespasser; that he was guilty of contributory negligence; and that he assumed the risk incident to the place where he was riding.

The first three counts of the declaration charged in substance that ~~appellant~~ was a common carrier corporation engaged in interstate com-

merce ;that ~~appellee~~ Plaintiff was in its employ; that he was, on the day in question, being transported by ~~appellant~~ defendant from his home to his work some twenty miles distant; that he was riding in the cab of the engine drawing the train with the consent of ~~appellant~~ defendant; that it was the duty of ~~appellant~~ defendant to use reasonable care to keep its roadbed in reasonably safe condition; that it failed in that duty; that the roadbed was not reasonably safe, specifying the defects; that ~~appellant~~ defendant knew it or ought to have known it by the exercise of reasonable care; that ~~appellee~~ plaintiff did not know it; that ~~appellee~~ plaintiff was in the exercise of reasonable care for his own safety and that because of the negligence of ~~appellant~~ defendant in failing to keep its roadbed in reasonably safe condition the engine left the track

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and turned over injuring ~~appellee~~ plaintiff. The fourth, fifth and sixth counts ~~are~~ were substantially the same as the first three, except that it ~~is~~ was therein charged that the coach provided for the workmen to ride in was insufficient in size to contain all the laborers being conveyed; that the train was being propelled at a high and dangerous rate of speed under the circumstances, and the condition of the track, and that the person in charge of the engine was not an engineer and did not have sufficient skill to run the engine properly.

The sufficiency of the declaration was not challenged by demurrer but a plea of not guilty was interposed by appellant and the cause was tried by a jury.

The declaration would have been sufficient even if it had been challenged by special demurrer, and is certainly sufficient after verdict to sustain the judgment. There is nothing in it from which it can be inferred that any rule existed or that any order had been given prohibiting appellee or any of his co-laborers or other persons from riding in the cab of the locomotive with the servants of appellant in charge of it. Unless riding in the cab was prohibited by some rule, order or law, one doing so

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would not be a trespasser if he was rightfully on the train, which is not denied. If there was any rule or order of the company prohibiting him from riding there, it was for appellant to show. The most that could be said of it would be that appellee might have been guilty of contributory negligence if he had known, or by the exercise of reasonable care for his own safety would have known of the conditions of the track at the place of the injury. In fact, there is nothing in this record to indicate that the position in the cab occupied by appellee would not in itself have been reasonably safe if the roadbed where the accident occured had been kept in repair. The averment that appellee was in the cab with the consent or by the invitation of the person in charge of the locomotive without the further averment that such person had authority

to give such consent or invitation amounts to nothing and is not considered by us in determining the sufficiency of the declaration.

Contributory negligence is no bar to an action for personal injuries brought under the Federal Employer's Liability act. The amount of damages to be recovered may be lessened thereby, but it does not go to the right to recover. (Kendrick v.

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C. & E. I. R. Co., 188 Ill. App. 172; Devine v. R. I. & P. Ry. Co., 185 Ill. App. 488; Robert's Injuries to Interstate Employes, Sec. 110.) While it is, to say the least, doubtful whether appellee was required to negative contributory negligence in his declaration, each count contains an averment of due care on the part of appellee for his own safety. There is nothing in this declaration to indicate that the question of assumption of risk is in any way involved. On this question, when it arises in actions under the Federal Liability Act, the decisions of the state courts do not control. In such cases the defense must be governed by the decisions of the Federal courts. Under these decisions an employe does not assume risks that are not necessarily, ordinarily or naturally incident to the occupation in which he is engaged until he becomes aware of the defect or neglect out of which the danger arises and the risk involved, unless both defect and risk are so obvious that an ordinarily prudent person would have observed and appreciated them. (A. L. R. Co. v. Horton, 233 U. S. 492; Robert's Injuries to Interstate Employes, Sec. 98, and authorities there cited.) The defects in the track alleged in the declaration to have been the cause of the injury were not

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the ordinary or natural conditions incident to the transportation of an employe of a common carrier engaged in interstate commerce to and from his field of labor, and were of a character and located at such a place that even an extremely cautious person situated as he was would not be likely to be aware of them or of the danger and risk involved; and it is alleged in the declaration that in fact he did not know of the same. Neither does the fellow servant doctrine furnish a defense under the facts alleged in this declaration. (Robert's Injuries to Interstate Employes, Sec. 104.)

An examination of the evidence shows that all the material averments of the declaration were proven. It shows that appellee was rightfully on the train, and it fails to show any rule or order of the company or any of its officers excluding appellee from any part of the train. Counsel for appellant have frequently referred in their argument to the claimed fact that Wood, the foreman of the gang to which appellee belonged, had ordered him from the locomotive. It is true that at one time when the locomotive was standing still and appellee was idling his time away sitting in it, Wood ordered him to get off from it and go to work. That

order had nothing whatever to do with his riding

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on it while being transported between his home and his work, and appellee testified Wood never ordered him not to ride there.

The verdict of the jury settled the questions of fact in favor of appellee and their finding is in accord with our views of what the evidence shows. Appellee's right to recover cannot be determined by the rules applicable to persons who are injured while committing a trespass. There is no evidence in the record from which it can be held that appellee either assumed any risk or was guilty of contributory negligence. There was no error in the rulings of the court on the admission of evidence or in instructing the jury.

Finding no reversible error, the judgment is affirmed.

Judgment Affirmed.

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GENERAL No. 6503. APRIL TERM, A. D. 1916. AGENDA No. 8.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error,
vs.
EARL HARDY,
Plaintiff in Error

Error from the County Court of Morgan County

202 I.A. 484

GRAVES J.

The states attorney of Morgan County filed in the County Court of that county an information charging plaintiff in error with selling intoxicating liquor in anti-saloon territory.

The case was tried at the September term of that court and the jury returned as their verdict a paper in the following language:—

"The Court instructs the Jury, if you find the defendant guilty the form of your verdict may be:

"We, the Jury, find the defendant, Guilty Earl Hardy, of selling intoxicating liquor in manner and form as charged in the First Count of the information," the Jury to fill the blank with the number of the Count or Counts you find the defendant guilty of."

This paper was signed by all the jurors. Motions for a new trial and in arrest of judgment were interposed by plaintiff in error and were heard and overruled by the Court and judgment on the verdict was pronounced. Two errors only are assigned. First, that the Court erred in overruling the motion in arrest of judgment and second, that the Court erred in rendering judgment on the verdict.

The contention of plaintiff in error is that the paper returned by the jury as its verdict is not definite, clear and certain, is not a verdict and does not find the defendant guilty.

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It is not disclosed by the record where the jury obtained the form of the verdict employed in this case. It is, however, manifest that it obtained from some source an instruction as to the form of a verdict, and after filling the blank left to be filled by the jury, they signed it and returned it into Court.

From this verdict as signed, there can be no doubt that the jury intended to find, and did find, the defendant guilty in manner and form as charged in the first count of the information.

The preamble and conclusion of the instruction so used as the form for the verdict is not and does not purport to be any part of the finding of the jury and should be disregarded as surplusage.

When a verdict does substantial justice, informality should not vitiate it. **Bates v. Williams** 43 Ill. 494.

There is no contention here that the evidence was not amply sufficient to warrant a verdict of guilty, or that substantial justice, on the merits was not administered in this case.

The judgment is therefore affirmed.

Judgment affirmed.

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Judgment affirmed.

2312

GENERAL No. 6506. APRIL TERM A. D. 1916. AGENDA No. 11

JOHN S. CARPER,

Appellant,

vs.

A .M. MYERS, et al.,

Appellees

Appeal from Circuit Court of Clark County

202 I.A. 485

GRAVES, J.

Appellant on February 16, 1916, made, executed and delivered to one, L. M. Sidey, a lease, in writing not under seal, by which the said Sidey was given the right to drill and operate wells on the premises described and to remove from said premises through said wells all the oil and gas thereunder. This lease was assigned several times and finally became the property of Appellees. By its terms, as the same were when it was assigned to Appellees, the lessess and their assignees were bound to drill a well before October 30, 1913, and, if oil or gas should be found in quantities to cause them to feel justified in so doing, they should drill a second well in 60 days and an additional well every 60 days thereafter until seven wells were drilled on the premises, and that in case such wells were not drilled when they should have been, the leasees were to pay $2.00 per day for each day such drilling was delayed or the lease be canceled for all the premises except five acres around each well completed.

The claim of Appellant is, that a paying well was completed on December 20, 1913, another on May 11, 1914 and another on May 25, 1914; that no more wells have ever been drilled; that he is entitled to recover of Appellees $2.00 per day from February 18, 1914 to May 11, 1914 and $2.00 per day since July 25, 1914 to the beginning of this suit. To recover these penalties and also to recover for timber furnished by Appellant to Appellees to the amount of $12.50, this suit was brought. The jury return a verdict for plaintiff and assessed his

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damages at $12.50. On this verdict, judgment was entered.

The judgment in this case is in favor of Appellant. He has argued several claimed errors in the rulings of the Court on the admission and exclusion of evidence and in the giving and refusing of instructions, that relate to his rights to recover. The errors argued would be proper to be considered by this Court if the verdict and judgment had been for appellees, but a party in whose favor a judgment is rendered can not be heard to complain of errors of the Court that do not relate to, or tend in any way to effect the amount of the verdict, but which relate solely to right to recover. **McQuoid vs. The People,** 8 Ill. 76. **Schlencker et al. vs. Risley,** 4 Ill. 483. **Douglas vs. Soutter,** 52 Ill. 154.

The question of the inadequacy of the verdict was not mentioned in the motion for a new trial and was in no way raised in the circuit court.

Courts of review uniformly refuse to reverse judgments for reasons the trial courts have never had the opportunity to consider. **Hearst's Chicago American vs. Spirs,** 117 Ill. App. 436. **American Trust & Savings Bank vs. Gradle,** 59 Ill. App. 333. **Mowatt vs. Cole,** 59 Ill. App. 349. **Shoaff vs. Funk,** 182 Ill. 224. Even if the question had been raised in the circuit court, there is no assignment of error on the record presented to this Court which presents the question for review. **Pennsylvania Co. vs. Coutan,** 101 Ill. 93. **Taylor vs. Wright,** 121 Ill. 455. **Jackson vs. Warren,** 32 Ill. 331. **Hearst's Chicago American vs. Spirs,** 117 Ill. App. 436.

For these reasons the judgment of the Circuit Court is affirmed.

Judgment Affirmed.

2313

GENERAL No. 6509. APRIL TERM A. D. 1916. AGENDA No. 14.

THE PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,
vs.
OWEN L. SEED,
Plaintiff in Error.

Error to the County Court of McLean County

202 I. A. 186

GRAVES, J.

Plaintiff in error was convicted at the August term 1915 of the County Court of McLean County of the crime of wife abandonment. He has been married to the prosecuting witness for ten years. No children appear to have been born as a fruit of this marriage. The proof shows that, after the marriage, plaintiff in error and his wife resided in Bloomington in the house of her mother until the summer or fall of 1911. They rented the house and defrayed the expenses of the household and her mother lived with them. Plaintiff in error was working by the month when they were married. Later he opened an advertising agency and failed. He then owed some $2200.00 more than he could pay. He then obtained a position with the Oliver Typewriter Company at a salary of $100.00 per month. In the summer of 1911, he left the employ of the Oliver people and accepted a position with the Aetna Life Insurance Company on a commission basis. To this change his wife objected because the compensation was uncertain. In August or September 1911 they moved to Olney, Illinois to be in the territory in which his work required him to be. At Olney they resided with the parents of Plaintiff in error where they were apparently welcome, were treated kindly and were charged no board. The complaining witness became dissatisfied with residing with her husband's parents and insisted on his renting a house and furnishing it so they might live by themselves. This he did in the summer of 1912. No fault seems to

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have been found by the wife with the house rented or the way it was furnished. When they moved into the house in Olney, Plaintiff in error made arrangements with the Company he was working for to send his wife $10.00 per week for household expenses. This arrangement displeased his wife for the assigned reason that it would have to be paid back if his commissions were not sufficient to pay his expense and this advancement. She wished him to work at something where he could get a fixed salary. She was nervous and worried about his indebtedness and felt that he was not doing as well as he might. When he returned home from one of his trips in the early part of October 1912, he found his wife nervous, she complained of being lonesome and of being unable to sleep. After some parley and a consultation with a physician, they went to Bloomington to her mother's house. This seems to have been by mutual consent. They arrived at

Bloomington early in the morning. Plaintiff in error left his wife with her mother and that evening went away to attend to his business. When he left her he kissed her good-bye and he testified that he told her whenever she was ready to come home she should let him know and he would come and get her. This she denies. He did not return until November 1912. During his absence he wrote her frequently, nearly every day and some days twice. He addressed her in terms of endearment and seemed solicitous for her welfare. She wrote him rarely and her letters were not effusive. The last letter he received from her was little more than a general complaint and a request for her clothes. On November 4th or 5th, 1912, he visited his wife at her mother's home in Bloomington. At this visit there seems to have been a considerable amount of complaint made of a general character such as, that he had not treated her right; that he was not doing the part of a man; that he had made it hard for her; that he had better change his tactics or it might be uncomfortable for him, etc. This talk was mostly by a sister of the wife of Plaintiff in error. When he left that night, he testified his wife came to the door and he kissed her good-bye and

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again told her when she was ready to come home to let him know and he would come after her; that they were both crying when he left her that night. After that night until November 21, 1912, he continued to write her and send her money. On that date he was taken violently sick in Indiana and was delirious and unable to give any information concerning his family or his employers and so remained until January 1913. While he was sick the Company, not being able to get track of him, wrote to his wife asking for information. About January 8, 1913, he recovered from his illness sufficiently to return to Olney where he found a large amount of mail but no letters or other communication from his wife. He kept the house in Olney in which they had lived until April 1913, when becoming satisfied that she was not intending to return, he surrendered his lease.

When on the witness stand the prosecuting witness was asked, "Were you ready and willing to live with Mr. Seed in November 1912" and she replied, "Well if he would do what was right, I would have been willing to have lived with him."

In order to warrant a conviction for wife abandonment, the proof must show such a state of facts, as would, if they continued for the period of two years, warrant the granting of a divorce to the wife on the ground of desertion. **Virtue vs. The People,** 122 Ill. App. 223.

If the separation is due to the desertion of the husband by the wife or if it is by mutual agreement of the parties, the husband can not be held amenable to the criminal law or be held guilty of desertion. **Virtue vs. The People,** 122 Ill. App. 223. **Loftus vs. Loftus,** 134, Ill. App. 360.

The evidence in this record falls far short of showing that Plaintiff in

error was guilty of the charge laid against him. On the contrary the weight of the evidence tends to show that the separation was due to the disinclination of the wife to further continue the marriage relation with Plaintiff in error.

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The only possible object Plaintiff in error could have had in maintaining the home in Olney for five months after he took his wife to her mother's home in Bloomington, was to have a home for her to come to when she felt able and willing to return. His conduct was all inconsistent with the purpose of abandoning his wife. While hers was all inconsistent with an intention on her part of returning to him. Her own testimony where she said, "if he would do what was right I would have been willing to have lived with him," is an admission that because she considered that he did not do what was right she refused to live with him. He may not have done what was right in many respects. He may indeed have been guilty of positive wrong in many respects, entirely sufficient to warrant her in living separate and apart from him and yet have been innocent of the charge of abandoment.

Whether he has violated any other law or failed in any other duty he owes to his wife, we have no means of knowing but, it is clear on this record he is innocent of the charge of wife abandonment.

The judgment of the County Court is therefore reversed because the verdict on which the same is based is manifestly contrary to the weight of the evidence.

Judgment Reversed.

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Judgment Reversed.

GENERAL No. 6512. APRIL TERM A. D. 1916. AGENDA No. 17

E. E. ROUSTON, et al., Appellants

vs.

GEORGE E. SLATER, et al., Appellees.

Appeal from the Circuit Court of Fulton County

202 I.A. 487

GRAVES, J.

~~On September 9, 1914,~~ ~~Appellants~~ Complainants as tax payers in school district 158 in Township four North, Range Three East of the Fourth Principal Meridian in Fulton County, filed their bill in chancery in the Circuit Clerk's office of said County praying for an injunction restraining ~~appellees~~ defendants, as the board of directors of said school district, "from moving said school house site in said district from its present location and from building a new school house on said pretended new school house site, and from issuing bonds or levying a tax upon the property of said school district for the purpose of building such new school house." Later, by proper amendment to the bill, one Henry Hughes, was made a defendant as a contractor interested in the construction of the proposed new school house. ~~Appellees~~ Defendants appeared and answered the bill. The important part of the answer was that a special election was legally called on July 23, 1914 and was legally held in said school district on August 6, 1914, in which election about one-third of the legal voters of that district participated and that a large majority of those who voted at that election cast their ballots for a new school house site, for building a new school house and for issuing bonds to raise money with which to build the same.

~~Appellants~~ Complainants, while admitting that a pretended election was

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held in said district on August 6, 1914, and that the result of the same was as stated by ~~appellees~~ defendants, ~~deny~~ denied that such election was properly called or held or that the result of it authorized or justified ~~appellees~~ defendants in the dong of the things contemplated. Other issues were contested but in the view we take of the case the one suggested will be the only one necessary to be determined.

Section 119 of Chapter 122 R. S. (P 10140 Jones and Addington Ill. Statutes) provides, "It shall not be lawful for a board of directors to purchase or locate a school house site, or to purchase, build or move a school house—without a vote of the people at an election called and conducted as required by section 198 of this act."

Section 198, Chap. 122 R. S. (P 10236, Jones and Addingtons Ill. Statutes) in part provides "When it is desired to hold an election the directors shall give at least ten days notice of the election by posting notices in at least three of the most public places in the district."

Section 195, Chapter 122 R. S. (P 10233 Jones and Addingtons Ill. Statutes) provides, "For the purposes of building or repairing school houses or purchasing and improving school house sites, the directors of any school district, when authorized by a majority of the votes cast at an election held for the purpose may borrow money, and as evidence of such indebtedness, may issue bands — —.— ."

An election held for the purpose of choosing or changing a school house site, building a new school house or issuing bonds is a special election, and must be called by the directors of the school district in which the election is to be held.

School directors can not act as a board except at a general or special meeting. Section 111 Chapter 122 R. S. (P 10132 Jones and Addingtons Ill. Statutes) **Armstrong vs. School Directors,** 160 Ill. App. 430.

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Section 112 Chapter 122 R. S. (P 10133 Jones and Addingtons Ill. Statutes) provides "the clerk shall keep in a punctual, orderly and reliable manner, a record of the official acts of the board which shall be signed by the president and clerk — — — ."

The only way the fact can be established that a regular or a special meeting of a board of directors was held, or what, if any, business was transacted at any such meeting is by the record which the law requires shall be kept of such matters. **Southworth vs. Board of Education** 238 Ill. 190, where it is said, "A corporation such as this presents proof of its acts in proceedings of this character only by its record, and it was therefore necessary that proof of the acts of the Corporation in giving notice should be in some manner preserved of record. There being no record that the board gave notice, a jurisdictional prerequisite to the location of the site is lacking." See also **People vs. Carr et al.** 265 Ill. 222. **People vs. Carr,** 231 Ill. 502. **Highway Commissioners vs. Smith,** 217 Ill. 250. **Scown vs. Czarnecke,** 264 Ill. 305.

Our attention has been called to no record, in the record book of district No. 158, of any meeting of the board of directors of that district after May 9, 1914, that any one claims was there when this suit was commenced and director O'Malley, who was the clerk of the board and whose duty it was to keep that record, testified before the master on the hearing of this case that no such record then existed. Later, in his examination, he called attention to a memorandum without date, made by his wife in the record book sometime after August 6th in the words and figures following:

"An Election was held at Town Hall in School Dist. No. 158 in Fulton Co. State of Illinois, on Thursday, Aug. 6, 1914, for the purpose of changing site and building new School House.
For proposition to change site of School House Twenty Eight voted for and Three against.
For proposition to build new school House Twenty-nine voted for and Three against.
For proposition to Bond Dist. Twenty Eight voted for and Three against."

It is not contended that this memorandum amounts to a record

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in any proper sense. It follows that at the time this suit was commenced and while the evidence was being taken before the master, there was no record of the calling of the special election at which it is claimed the three proposition, i. e. to change the school house site, issue bonds, and build a new school house, were submitted to the voters or of the posting of notices of such special election or the holding of such special elec-

tion or the result thereof. Proof aliunde the school directors record, was offered tending to show some of these things, but under the authorities heretofore sited, such proof was incompetent and could not be made the basis of judicial determination.

~~Later in the trial~~ a typewritten, purported record of a meeting of the directors supposed to have been held on July 23, 1914, which had been dictated by an attorney and by him pasted into the record book some three months after this suit was brought, was introduced in evidence to prove the calling of the special election in question. That writing was as follows:—

"STATE OF ILLINOIS, }
COUNTY OF FULTON, } ss.
TOWN OF ISABEL. }

July 23, 1914, a special meeting of the school Directors of School District 158, Fulton County, State of Illinois, was held at the Penny Grocery Store in said district, said meeting called by the president, due notice having been given to all of the directors.

The directors present were Geo. Slater, Clyde Guiher and M. O'Malley. The object of said meeting was for acting upon the questions of calling a special election to vote upon the questions of a new school house. After considerable discussion among the directors it was ordered by the directors all members voting "Aye" that a special election be called for the said following purposes.

1. Voting For or Against the proposition to change the site of the School house in Dist. No. 158 from its present location to S. E. Corner of the George Dilworth farm.
2. Voting for or against the proposition to build a new school house in Dist. 158, the same to cost not to exceed $2,000.
3. Voting for or against the proposition to bond Dist. No. 158 in a sum not to exceed $2,250 to pay for new building and new site.

Geo. C. Slater, President.
M. O'Malley, Clerk."

It will be observed that this writing, even if it be conceeded to be a genuine record of what transpired at a meeting of the board of directors, shows that the board concluded to **sometime** call a special election but it does not show that one was in fact called. Neither

does it show when or where it was intended such election should be held when it should be called.

Certain notices of an election to be held on August 6, 1914 which it is claimed were posted on July 27, 1914 were offered in evidence. On the face of these notices appears the following:

"By order of the board of directors of said District dated this 27th day of July 1914." If any such notices were ordered posted by the board on that or any other day the record of the board does not show it, and the recitals in the notice can not be accepted as proof that such an orded was made.

There is no proper proof in this record that any special election was called to be held in district No. 158, on August 6, 1914, therefore what occured at that time and place is a nullity and does not furnish any justification or authority for these appellees to make the proposed change in the school house site, to issue the proposed bonds or build the proposed school house.

Some months after this suit was commenced an attorney dictated and had written up a purported record of the holding of an election on August 6, 1914, in school district No. 158, the posting of notices of such election and the purposes and result of such election and pasted the same into the record book of the school district. It was labelled "Amended record." The secretary says he directed the attorney to dictate the paper but, who directed the clerk to direct the attorney to write an amended record or what authority the clerk had to so direct or to amend an existing record, does not appear nor does it appear what existing record the writing was supposed to be an amendment of. Even if it could be considered as a correct and proper amendment of a record, we fail to see how it can avail appellees anything to recite what happened on August 6, 1914, when what happened on that day was void for want of proper preliminary steps.

The decree of the Circuit Court is therefore reversed and the cause is remanded to that Court with directions to grant the prayer of the bill.

Reversed and Remanded with Directions.

GENERAL No. 6515. APRIL TERM A. D. 1916. AGENDA No. 20

RILEY REAMS,

Appellee

vs.

CORA A. REAMS,

Appellant

Appeal from the Circuit Court of Vermilion County.

202 I.A. 491

GRAVES, J.

The parties to this case are husband and wife. They were married March 7, 1906 and lived together until October 31, 1910. Appellant had been previously married and had a daughter who was, at the time of the marriage of these parties, about twelve years of age. On October 31st, appellant left the home where the family had been living since the marriage and removed therefrom all her personal belongings. On November 5, 1910, five days after the separation, the parties met at the home of appellant and entered into a contract in writing, the execution of which is admitted by the pleadings by which appellant was to receive in lieu of all her dower, homestead and other rights arising from the marriage relations all the household goods belonging to the parties and the sum of $3000.00. On April 14, 1915, about four years and six months after the separation, appellee, the husband, filed his bill for divorce in the circuit court of Vermilion county, charging his wife with willful desertion commencing October 31, 1910 and persisted in by her until the time of filing the bill, being for two years and upwards.

Appellant answered admitting the separation but denying the charge of desertion and avering that the cause of the separation was the fact that appellee had refused to live and co-habit with appellant.

She also filed a cross bill in which she charges in general terms that appellee had abused, mistreated and ignored her and specifically "that he refused to maintain a residence, separate and apart from the house of his mother." She also charges appellee with two acts of

extreme cruelty, and with being cross, fretful, and peevish. Complainant in the cross bill prays for separate maintenance only.

Appellee answered the cross bill denying specifically every charge made against him therein, and thereupon issues of fact were submitted to a jury and pursuant to a premptory instruction the jury returned a verdict for the defendant in the cross bill on all issues submitted to them thereon. After hearing all the evidence on the issues formed on the original bill, they found the issues submitted to them thereon, for the defendant.

The complainant in the cross bill is the appellant here. The complainant in the original bill has filed cross errors. Appellant has moved to have the cross errors filed by appellee stricken from the record. In

the view we take of this case it will be unneccessary to dispose of this motion.

Desertion in order to be a valid ground for divorce must not only be willful and without reasonable cause in the beginning, but must continue so for the period of at least two years. **Albee vs. Albee,** 141 Ill. 550. Living separate and apart by consent or by agreement will not constitute willful desertion or entitle either party to a divorce on that ground. **Loftus vs. Loftus,** 134 Ill. App. 350. Chap. 40. Sec. 10 R. S.

The making of the contract above referred to, particularly in view of the fact that it was made so soon after the separation, and the further fact that it recites that it was made because of such separation and in contemplation of its continuance, amounted to such a consent to and an agreement for a separation as to deprive such living apart of the element of willful desertion on the part of either of the parties. While under some circumstances contracts adjusting property rights between husband and wife are legitimate and proper, yet if they are made in contemplation of the parties thereafter living separate and apart from each other

they are looked upon by the law with disfavor. **Boyd vs. Boyd,** 188 Ill. App. 136. Such contracts usually tend to show rather than disprove collusion. Section 10, Chapter 40 R. S., expressly provides that when it appears from the evidence that a complainant in a divorce suit has consented to the doing of the thing made the basis of the prayer for a divorce, then the divorce shall not be decreed. The original bill was properly dismissed.

The cross bill is somewhat unusual as a bill for separate maintneance. In addition to the usual averments, the making of a settlement between the parties of their property rights is averred and the contract itself is attached to the cross bill as an exhibit. The pleader then, in very general terms, has undertaken to charge that the signature to that contract was obtained by some unfair means which is described as "Force, duress or fraud" but no sufficient averment of fact is made from which the use of force, duress or fraud in the procurement of the settlement can even be inferred. Notwithstanding the insufficiency of these averments in the cross bill, appellee saw fit to deny that force, duress or fraud were used in procuring the settlement. He also denied all other averments in the cross bill, but the only issue of fact submitted to the jury, relating to the cross bill was "Did the complainant secure the signature of the separation agreement by the defendant by means of fraud and duress?" No complaint is made by either party that other issues of fact were not submitted or that this issue of fact was improperly submitted. Upon the trial no proper proof of the use of force, duress or fraud was introduced or offered and the court properly instructed the jury to return a verdict finding the issue submitted to them on the cross bill for the defendant in that bill.

The only remaining question to be determined in this case is whether,

upon the proof offered on issues not submitted to the jury, the complainant in the cross bill was entitled to a decree for separate maintenance. On this question it is first contended that appellant was

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justified in asking for separate maintenance because she was compelled to live with her husband's parents, and the case of **Alber vs. Alber,** 141 Ill. 550 is cited as holding that a wife is justified in leaving her husband if he furnished her no home except with his parents. There are two reasons why this contention is not tenable. In the first place the proof shows that appellant was not compelled to live with her husband's parents except for the first year of their married life. After that, the families lived separately although on the same farm. In the next place the Supreme Court did not in the Alber case hold that being required to live in the same house with her husband's parents was a sufficient excuse for a wife to leave her husband or anything like it. Even the syllabus, which is by no means a correct digest of the opinion, does not so announce the holding of the court. What the court holds in that case is that the wife in that case when she left had no fixed determination to desert her husband and that even if she then was possessed with such an intention she later and within two years manifested her desire in good faith to return to her husband and on that state of facts the Court said, "However willful the desertion may be and however destitute of reasonable cause, it is no ground for divorce unless it is continued for two years." Few opinions ever written by the Supreme Court have been more misquoted than this one, due probably, in the first instance, to the carelessness of the syllabus writer.

The charge of cruelty and misconduct of appellee was not established by the evidence. Appellant testified to some acts which, if they occured and were the occasion of her leaving her husband, might have justified her. Appellee in his testimony denied every charge made by appellant and was apparently entitled to as much credit as a witness as was appellant. In that state of the record a court would not be justified in holding that the charges had been supported by a preponderance of the evidence.

The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

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GENERAL No. 6518. APRIL TERM A. D. 1916. AGENDA No. 23

ALICE V. NORTON,
Plaintiff in Error.

vs.

UNITED COMMERCIAL TRAVELERS OF AMERICA, ~~Etc.~~ Incorporated.
Defendant in Error.

Error to Circuit Court of McLean County.

202 I.A. 49?

GRAVES, J.

This is a suit begun March 15, 1915, by Alice V. Norton, widow of Samuel Lee Norton, deceased, on a certificate of insurance issued to him on October 21, 1910, in which she is named as beneficiary in case of his death. Samuel Lee Norton, on ~~that~~ the date, was a commercial traveler. He was in the employ of the Cement, Tile and Machinery Company of Waterloo, Iowa on a salary. After August 1912, he continued in the employ of the same company but received his compensation by way of commissions instead of a salary. In the fall of 1912, he with others entered into a co-partnership known as the Havana Concrete, Tile and Product Company of Havana, Illinois. He was employed as manager of that company. He still continued to be in the employ of the Cement, Tile and Machinery Company. While he was on a collecting trip as manager of the Havana Concrete, Tile and Product Company on June 27, 1913, he was accidentally drowned. He was in good standing in the United Commercial Travelers of America at the time of his death. Proof of death was made in due time. ~~Defendant in error~~ admitted liability to the extend of $3150 which it paid. Plaintiff ~~in error~~ contends that she should have received $5000 within 90 days after the receipt of satisfactory proof of the accidental death of the insured and $1300 in weekly installments of $25.00, amounting in all to $6300. The contention of defendant ~~in error~~ ~~is~~ was that the deceased changed his occupation and thereby it became liable to only one half of the amount named in the certificate; that there has been an accord and satisfaction and that the suit ~~is~~ was barred by the limitation stipulated in the contract.

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Section 5 of Article 6 of the constitution of defendant in error, in force at the time the deceased became a member, provided for the payment to the beneficiary of a member, in case of the death by accidental means, of the sum of $5000 within 90 days after the receipt of satisfactory proof of such death, and $1300 more in weekly installments of $25.00 and further provided "that should any member engage, temporarily or otherwise in any other occupation than that of * * * traveling agent * * * commercial traveler * * * proprietor of a manufactory performing office duties only * * * his beneficiary should be entitled to but one half the sum to which such beneficiary would have been entitled to had he been engaged as a commercial traveler at the time the injury was received on which the claim of payment is based."

The case was tried by the court without a jury, on a stipulation of facts. The court held that "under the pleadings and facts stipulated in this case that Samuel Lee Norton, at the time of his death, was included within the classification made by defendant in its constitution and bylaws which entitled his beneficiary to receive $6300 upon his death by accidental means," and also held that there had been an accord and satisfaction of the claim by the payment of $3150 and that the action is barred by Section 8 of Article 6 of the Constitution of defendant in error which requires suit to be begun within six months after the disallowance of the claim. The plaintiff below sued out this writ of error and defendant below has assigned cross errors based mainly on the finding of the Court above referred to that the deceased was within the classification entitling his beneficiary to receive $6300.

The stipulation of facts shows that, after the certificate sued on was issued, the deceased became a partner in a firm known as the Havana Concrete, Tile and Product Company and acted as Manager of the business of that Company on a salary; that his duties as such manager were "office work in the ways of bookkeeping, employing help to run the factory, purchasing materials used in manufacturing the output, and making trips to

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various points in Illinois in the interest of the firm, selling its output and collecting its accounts, and generally superintending its business affairs and had no duties in the factory."

In so far as the new employment required the deceased to perform the duties of a "Commercial traveler" his employment remained the same as it was when the certificate was issued. In so far as it required of him other or different duties than that of Commercial Traveler, they were performed as a "proprietor of a manufactory," and consisted of "Office duties only." The finding of the Court that the deceased at the time of his death was still included within the classification entitling his beneficiaries to received $6300 upon his death by accidental means was therefore correct.

No question has ever been raised in this litigation as to the liability of defendant in error to pay $3150, the amount actually paid. Its liability to that extent has always been conceded. To that extent at least the debt was liqudated and certain. It is not contended that defendant in error at the time of the payment of $3150 was insolvent or that there was any way it could have escaped the payment of that amount of money at the time and in the manner it was paid. Under those circumstances even if it were paid and accepted in full of all liability upon the certificate sued on, the agreement that it should be in full, not having any consideration to support it, would be a mere **nudum pactum. Knight Templars, etc. vs. Crayton,** 110 Ill. App. 648. The Court erred in holding that the acceptance the $3150 paid constituted an accord and satisfaction.

Section 8 of Article 6 of the Constitution of defendant in error provides, "No suit or proceeding either at law or in equity shall be brought to recover any sum alleged to be due from the Order unless the same be commenced within six months from the date that the claim or the proposed claim was disallowed."

Clause 31 of the stipulation of facts is as follows:— "That the defendant, under date of February 24, 1915, wrote the following letter to Martin & Hose, attorneys, relative to the claim of Alice V. Norton, plaintiff, on account of the accidental death of her husband, Samuel Lee Norton, in which they finally rejected plaintiff's claim and refused to allow her any further amount, * * *."

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By this stipulation, the parties have themselves determined that the claim sued for was disallowed February 24, 1915. This suit was commenced March 15, 1915, less than six months after the claim was disallowed and was therefore within the time fixed by the terms of the constitution of defendant in error above quoted.

The Circuit Court therefore erred in holding that the suit was barred by a limitation agreement.

For the reason given the judgment of the Circuit Court will be reversed and judgment entered here in favor of Plaintiff in Error and against defendant in error for $3445, the same being for the principal sum of $3150 and interest thereon from February 24, 1915 to this date at the rate of five per sent per annum amounting to $295. Judgment also against defendant in error for costs in both courts.

Reversed Judgment here for $3445.

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GENERAL No. 6519. APRIL TERM A. D. 1916. AGENDA No. 77

WILL H. LATTA,

Appellant

vs.

THE GRANITE LIVE STOCK INSURANCE COMPANY AND LILLIAN LEVY,

Appellees.

202 I.A. 496

Appeal from the Circuit Court of McLean County

GRAVES, J.

Appellant filed his bill in chancery against appellees The Granite Live Stock Insurance Company, an Illinois corporation, and one Lillian Levy, by which he sought to have a note signed by him and payable to and held by the said Lillian Levy for $2000 declared to be the debt of appellee the Granite Live Stock Insurance Company, and to have certain certificates of deposit held by said company in its name declared to be held in trust by it for the payment of that note, and to procure an order enforcing said trust and requiring the company to pay the said note.

The original bill charged that on December 26, 1913, the appellee Insurance Company was indebted to appellee Lillian Levy in the sum of $2000 for certain certificates of deposit of money which the said Lillian Levy had deposited in certain banks in the name of the insurance company which certificates of deposit were turned over to the insurance company by the said Lillian Levy without any consideration and were still held by said insurance company, and that the insurance company was under obligation to surrender the same to her or pay her therefor, and that an express tri-party contract between

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appellee Lillian Levy, appellee The Granite Live Stock Ins. Co. and appellant, was made on said date whereby appellant agreed to give to appellee Lillian Levy, his promissory note for $2000, payable to her order in payment of said obligation, and appellee The Granite Live Stock Ins. Co., agreed to pay the same at maturity, and that in consideration of that agreement and no other, appellant executed and delivered the note in question; that the same was soon to mature, and that the Insurance Company refuses to pay the same.

Both appellees answered this bill and appellee Lillian Levy filed her cross bill in which she charges that appellant gave her the note in question for a good and valuable consideration, but now refuses to pay the same; that he is a nonresident of the state and that she is without remedy except by filing her cross bill, and asks for a decree requiring appellant to pay the note.

Issues being formed on the original bill and the cross bill, the cause was referred to the master to take proofs and report his conclusions.

After the master had filed his report of the evidence appellant amended his original bill so as to charge that he executed and delivered the note in question to Lillian Levy, in settlement of a claim held by her against

the Insurance Company and to procure the resignation of one Adolph Levy, as president of said company; that the Insurance Company received the entire consideration for said note; that the note is in equity and good conscience the obligation of said

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company and that said company should and had promised to pay the same.

The court upon a full hearing entered a decree in which the findings are all, we think without exception, against the contentions of appellant. It is therein found that the note is appellant's own obligation based upon good and valuable considerations; that it is the property of appellee Lillian Levy, and that equities are with the complainant in the cross bill. The bill of appellant was ordered dismissed for want of equity and he was ordered to pay to appellee Lillian Levy, the amount of the note with interest.

The following statement of facts is established by a clear preponderance of the evidence in this record. Appellant Will H. Latta, Adolph Levy, and John Rice, who had been conducting a partnership live stock insurance business, were attempting to organize a corporation under the laws of Illinois to be known as the Granite Live Stock Isurance Company, for the purpose of continuing that business. They obtained permission from the state to open books of subscription to organize such a corporation with a capital stock of $100,000, represented by 1000 shares having a par value of $100 each, and proceeded to solicit subscriptions for stock. They purposed to sell 500 of these shares of stock on the basis of $150 per share, $25 of this to go to the stock salesman, and $125 to go to create the 50 per cent capital required by the statutes (see par. 6615 of Chap. 73 Jones & Addington's Statutes) and to create a surplus of $12,500 The other 500 shares were to be divided between these three gentlemen according to some plan

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not important here. The entire 500 shares or stock that were to be sold were subscribed for and most of it paid for in cash when the day approached for the examination by state authority of the capital of the proposed new corporation before granting the charter. A note for $200 had been taken instead of cash for shares sold and $1800 of cash collected by a stock salesman had not been turned in and was not available. About that time a subscriber cancelled his subscription for stock to the amount of $700. That left the proposed surplus short by $2700, and also left unsold $700 worth of the shares of capital stock. At this time appellant was in France. Rice subscribed for the $700 worth of stock yet unsold and paid for and received the same. Levy borrowed from his wife $2000 and with it took up the $200 note referred to and made good the $1800 defalcation and the charter was issued.

Later, dissatisfaction having arisen with Levy as president of the

company, threats of litigation were made if he should not resign. It was for the interest of appellant and against the interest of Levy, that Levy should resign, and appellant besought him to do so, but Levy refused, unless the $2000 he had borrowed and invested in the note and in making good the defalcation was returned to him. Appellant suggested several plans to accomplish this, among them he suggested that Levy take the obligation of the new corporation or some of those newly interested in it, but this was objected to by at least some of the new directorate. It was also refused by Levy. Finally appellant

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agreed to give Lillian Levy, Adolph Levy's wife, his personal promissory note for the amount, provided Levy would resign. Levy, thereupon resigned, and appellant gave to Lillian Levy his note for the $2000 and she in turn surrendered to her husband the note for that amount which he had given her when he first borrowed the money. Appellant undertook to get some action by the directors of the corporation as such and to secure some promise by some of them personally that they or the corporation would pay the note, but was wholly unsuccessful.

Not a single material averment of fact contained in appellant's bill as amended was established by a preponderance of the evidence.

Several propositions of law have been argued, but they are without exception based on erroneous assumptions of fact and therefore have no bearing on this case.

On the record in this case the decree of the Circuit Court was clearly right, and the same is affirmed in all respect.

Decree affirmed.

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GENERAL No. 6523. APRIL TERM A. D. 1916. AGENDA No. 26

WALTER HACKL,

Appellee.

vs.

TOWER HILL COAL COMPANY,

Appellant

Appeal from the Circuit Court of Shelby County.

202 I.A. 497

GRAVES, J.

Appellant is a coal mining company. Appellee was a coal miner employed by appellant. On July 17, 1913, appellee was injured by an explosion following the firing of a shot in the particluar part of the mine where appellee and two other men were working as partners or "buddies." Suit was begun by him to recover for his injuries. His declaration originally contained seven counts but one was held bad on demurrer, and was not amended. The general issue was filed to all the remaining counts in the declaration. In part of the counts on which the case was tried, appellant was charged with a willful violation of the "shot firer's act" and in others that it was the duty of appellant to use reasonable care to furnish appellee, with a reasonable safe place to work and to warn him of the presence of latent dangers and with a failure to preform that duty. A trial before a jury resulted in a verdict and judgment against appellant for $1500.

Section 2 of the Shot Firer's Act, Jones & Addington Statutes paragraph 7513, provides that "in all mines in this state where coal is blasted, and where more than two pounds of powder is used for any one blast, *** a sufficient number of practical, experienced men to be designated as shot firers, shall be employed by the company and at its expense, whose duty it shall be to inspect and do all the firing of all blasts, prepared in a practical, workmanlike manner in said mine or mines."

The manifest intention of the legislature was to require the employment of shot firers in all mines where more than two pounds of powder

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is used in any one blast, by the order or consent of the company operating such mine. The use of more than two pounds of powder in any one blast by any miner, without the knowledge or consent of the company operating such mine, or in violation of express rules or orders of such company would not under the section quoted require the employment of shot firers by such company. It, therefore, became a material question of fact in this case to be determined by the jury whether over two pounds of powder was used in the mine in one blast and if so whether it was so used with the consent of appellant or against its rules or orders. Appellant introduced evidence tending to show, that if such amount of powder was so used, it was without the consent and against its express rules and orders. Appellee offered evidence to show that it was the custom and habit of the miners, known to, and acquisced in by appellant, to

use powder in excess of two pounds in single blasts.

It was also controverted question of fact, material under the pleadings in this case, whether the shooting or blasting of coal without undermining it was permitted or prohibited by the rules or order of appellant. In finding the issues for appellee, the jury necessarily found against appellant on these issues. If the findings of the jury on these issues were justified by the evidence then under the shot firers act, it was the duty of appellant to employ shot firers. This it is conceeded it did not do. It next became a material question of fact whether the failure to provide shot firers was the proximate cause of the injury to appellee. The verdict of the jury determined this question of fact also against appellant.

At the close of the evidence, appellant asked the court to premptorily instruct the jury to find the issues for it, the defendant. This the Court refused to do. In view of the fact that this judgment must be reversed for other manifest errors in the record, and that the case must be again submitted to a jury, it would be improper for us to discuss in detail the evidence bearing on these controverted questions of fact. It is sufficient to say that a careful study of all the evidence in the case dis-

closes that there is sufficient evidence in this record to warrant the verdict returned. **Libby, McNeil & Libby vs. Cook,** 222 Ill. 206. It also follows that the verdict is not so manifestly contrary to the evidence as to warrant this Court in reversing the judgment for that reason.

Many objections to the rulings of the Court on the giving, refusing and modifying of instructions, have been argued. Many of these objections are supertechnical and do not call for a reversal of the judgment. While others are substantial and the instructions therein referred to are fatally erroneous.

The instruction numbered 2 in the series given for appellee, directs a verdict, "If the evidence proves the plaintiff sustained injuries as a result of the defendant's negligence as charged in the declaration." In it the jury are also informed that, "If the proof shows that the defendant was negligent as charged in any one or more of the Counts of the declaration and that such negligence of the defendant was the proximate cause of the injury" etc. contributory negligence or the doctrine of fellow servant would not be a defense. Again in the same instruction the jury are advised that "*** if the proof shows that the defendant was guilty of negligence as charged in any Count of the declaration" and the plaintiff was injured as a result of such negligence, then neither contributory negligence assumed risk or the doctrine of fellow servant can bar the plaintiff's right to recover. In instruction numbered 5 given at the request of appellee, the jury were told that, if the injuries were received by appellee "as a result of the defendants negligence as alleged in the plaintiff's declaration or some one or more counts thereof" then the doctrine of fellow servant would be no defense.

The declaration contained two counts in which the defendant was

charged with willfully neglecting to preform his legal duty as defined by the shot firers act above referred to. In one of those Counts the language employed in that regard is "willfully and intentionally neglected."

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The proof of mere negligence unmixed with an intentional or conscious lack of obedience to the mandate of the legislature as expressed in the shot firers act would not give to appellee a right of action under either of the two counts charging willful violation of duty. **Cook vs Big Muddy Mining Company,** 249 Ill. 41 The two instructions were bad because they told the jury in effect that proof of mere negligence would be sufficient under any of the counts of the declaration including the two charging a willful neglect of duty. That is not the law. **Swinoseynski vs. Kelly Coal Co.** ,146 Ill. App. 720. These instructions can not be justified on the theory that it was the intention of the one that drew them to have them relate only to such counts as charge Common law negligence. As framed the jury undoubtedly understood them to relate to all the counts in the declaration. If the attorney for appellee intended to limit it to only part of those counts, he should have done so by the use of apt words which would have conveyed his meaning to the average mind.

Instruction numbered 3 given at the instance of appellee also directs a verdict and is fatally defective because it does not limit his right to recover to acts of negligence which are declared on in the declaration. **Ratner vs. Chicago City Ry. Co.,** 233 Ill. 169. The language employed in the instruction in that regard is "if a preponderance of the evidence shows the place furnished by the defendant to the plaintiff in which to work became or was an unsafe place for the plaintiff to work in by reason of **any negligent act or acts of the witness, Cornelli, or some employee of the defendant other than the plaintiff, by such other employee lighting more than one fuse attached to different cartridges" etc.** We have been unable to find any count in the declaration charging the injury to have resulted from the lighting at one time of more than one fuse attached to different cartridges. This instruction being premptory in form should also call attention to the claimed fact the appellant had rejected the provisions of the Workman's Compensation Act.

It is claimed that one of appellees eyes was injured at the time of the explosion. Dr. Coffey, a witness for him, testified on direct examination that the injury to one eye "will effect the other, what we call sympathetic ***. It will be effected to a certain extent." On cross examination, he testified, "All I meant to say was there was a mere possibility of a sympathetic affection, that such a thing could happen ***. It is

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only a mere possibility." A motion to exclude from the jury the testimony of this doctor as to what might possibly happen to the uninjured eye by way of sympathetic affection was denied. This was error. **Lawth vs. Chicage U. T. Co.,** 244 Ill. 244.

Other objections to the rulings of the Court on the admission of evi-

dence have been argued but we find no such errors as would warrant a reversal of the judgment, except those already pointed out.

For the reasons stated the judgment of the Circuit Court is reversed and the cause is remanded to that court for another trial.

Reversed and remanded.

2321

GENERAL No. 6534. APRIL TERM A. D. 1916. AGENDA No. 35

ISAAC W. NUTT,

Appellee.

vs.

Appeal from the Circuit Court of Ford County

F. B. VENNUM,

Appellant

202 I.A. 507

GRAVES, J.

Appellee farmed lands belonging to appellant for the two years ending respectively March 1, 1911 and March 1, 1912, under a separate written lease for each year. After March 1, 1912, he held over under a claim of having a verbal lease. In March, appellant began a suit in forcible entry and detainer which resulted in a judgment against appellee for possession and he was removed from the premises on April 27, 1912 by an officer. Part of his goods were also removed from the premises into the public highway. This suit was begun by appellee. It was tried on a declaration consisting of the common court with which a bill of particulars was filed, and a plea of the general issue with notice of set off. The bill of particulars was a long list of claims for work preformed, materials furnished, cash advanced, grain taken, board of men and damages for breach of a verbal contract. [A notice of set off specified claims for failure of ~~appellee~~ the plaintiff to deliver rent corn under the terms of the written leases, damages for allowing cockle burrs, thistles and other weeds to go to seed and for failure to cut the same as provided by the lease, for failure to haul out the manure and failure to deliver up the premises at the termination of the lease.] A trial by jury resulted in a finding and judgment for appellee for the sum of $800.

Appellant has assigned several errors but in his argument asks a reversal of the judgment only because of errors in the rulings of the Court upon the admission of evidence and in charging the jury.

(Page 1)

The first complaint concerning the rulings of the Court on the admission of evidence is that the record of the forcible entry and detainer case offered by appellant for the purpose of showing that Appellee was rightfully evicted, was excluded. The only reason why appellant claims it was competent is, that counsel for appellee and appellee himself had made use of expressions which disclosed that he had been put off from the farm by a constable. These expressions were mostly made use of in fixing dates or circumstances as "When I was put out that day." "I was there the next day after he was put off" etc. So far as we can see, there was nothing in these expressions to challenge the righteousness of his expulsion or to raise that question for the determination of the jury, and the offered record was properly excluded. Besides that the Court by an instruction given at the instance of appellant told the jury that appellant had the right to evict appellee from his farm and that the

officer had the right to place the property in the public road.

While a son of appellee was on the witness stand, he was interrogated regarding what became of the corn and oats raised on the farm and he said they put the corn in two cribs on the farm "We put his corn on one side and ours on the other. Afterwards we shredded it and hauled it to Cullom. We hauled his oats to town from the machine." The objection made to this testimony was that the witness assumed the ownership of the oats. The inquiry of this witness that elicited these answers, was as to what became of these crops, not who owned them or what part was owned by either party, and while it would have been better to have required both the questions and answers to be clothed in different language, it is apparent from a reading of the record that no one was misled by what was said, and that appellant was not prejudiced by it.

Numerous criticisms have been made by appellant of the instructions given at the instance of appellee and as a work of art they are certainly vulnerable, but we do not think any of the faults complained of constitute reversible error.

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The substance of the fourth of these instructions is that, if the jury believe from the evidence that appellee fairly divided the corn raised on the premises while he was tenant there and turned over to appellant his just, full and fair proportion thereof, and that he, appellee, was expelled from the premises by appellant and left thereon a quantity of corn and oats belonging to him which appellant took and appropriated to his own use, then appellant should be required to account for such corn and oats so taken, in so far as it exceeded the amount of set off which appellant should establish by his proof, even though the corn was not divided in the manner provided by the lease.

The lease referred to provided so far as the division of the grain raised on the premises was concerned as follows:

"The party of the second part * * * convenants and agrees to pay * * * one half of all grain raised, delivered at the nearest station, when ordered by party of the first part. Corn to be averaged in the field before husking to save dividing. This is to be done by disinterested parties if owner and tenant can not agree on average rows. The rows to be husked and weighed and all similar rows counted to learn amount of corn in field. One Hundred pounds of the corn to be sacked and preserved to ascertain the shrink. If owner sells in December, there will be no shrink if sold after that month, shrink will be in proportion to the shrink of the 100 pounds." The person who drafted this lease expended much gray matter in divising a next to impossible means of estimating the corn, in order as is recited in the lease "to save dividing" it, and appellant now seems to believe that because it was not "averaged" strictly in the manner provided by the lease, there can now be no correct division, and that appellee is helpless.

The instruction referred to proceeds on the theory that the landlord

was to received one half of the grains raised as rental and that, if he had actually received his just and full one half of all the grain

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that was raised

by the tenant on the rented premises, then he can recover no more for his share rent, even if the crop was not "averaged" as specified. We think the instruction announced the correct proposition of law and that the objections urged to this and other instructions are without merit.

There was no error in refusing appellants' instructions numbered from nine to thirteen inclusive.

The ninth was long, involved, confusing and likely to mislead the jury, besides that it proceeded on the theory that the important thing to be ascertained by the jury was whether the corn had been averaged according to the terms of the lease, not whether the landlord had received his full share of the crops raised. It is also erroneously assumed in this instruction that the lease provided that, in case the parties could not agree on an average of the corn, that appellant should choose three disinterested persons to make the average.

The tenth refused instruction erroneously placed the burden of disproving defendants set off on the plaintiff.

The eleventh refused instruction is bad because like the ninth it erroneously assumes that it was stipulated in the lease that appellant should choose the disinterested persons to average the corn in the field and that appellee had no right to have notice when it should be done.

The twelfth refused instruction is a mere cautionary instruction and was properly refused.

The substance of the thirteenth refused instruction was included in other instructions given at the instance of appellant.

None of the errors argued are sufficient to warrant the reversal of the judgment. It is therefore affirmed.

Judgment affirmed.

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GENERAL No. 6544. APRIL TERM A. D. 1916. AGENDA No. 41

GEORGE W. DULEY,

Appellee.

vs.

ILLINOIS CENTRAL R. CO.,

Appellant.

Appeal from Circuit Court of Vermilion County

202 I.A. 523

GRAVES J.

This is an action by appellee for personal injuries. There are two counts in the declaration. The negligence charged in the first count is that appellant by its servant carelessly and negligently permitted the trap door on the car which appellee was attempting to board, to close and strike appellee. The negligence charged in the other count is that the trap door in the vestibule where appellee was attempting to board the train, suddenly and without warning became loose and closed and struck appellee and that said door was not equipped with proper latches. There is no charge of any willful misconduct on the part of any of the servants of appellant.

The undisputed facts are that appellant was injured while attempting to board a train of appellant at a vestibule door of a sleeping car while the train was in motion and appellee says the vestibule door was open but the trap door was down.

There was a judgment against the railroad company for $5000.00 from which it appeals.

Why appellee was late in reaching the train is immaterial under the declaration in this case.

It is established by a preponderance of the evidence that the train in question was a long vestibule train; that it had pulled into the station at Paxton, Illinois, and stopped for passengers to alight from and board it; that it had started up and moved a short distance

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and again stopped to take on mail; that when appellee reached the train the vestibule door between the smoker and the ladies coach was open; that appellee walked towards the rear of the train and came to a car where a vestibule door was open and a "party that was in the door motioned for him to go further back along the train and he did so;" that when he had gone back a car length more he found a vestibule door open and the trap that closes down over the steps was down; that the train was then in motion going at a speed variously estimated at from three or four to as high as twelve miles per hour; that appellee attempted to board the sleeping car at the door where the trap was down and lost his hold and was injured. Appellee claims that when he reached the end of the coach where the vestibule door was open and the trap door was down the porter of that car raised the trap door and attempted to assist him on

to the car. This the porter of that car positively denies and the porter and conductor of the car next ahead and a bystander, who were all present when the train started the last time and would likely have known if the trap was raised, testify that they neither saw it raised of saw the porter trying to assist appellee to board the car. Appellee also testified that he succeeded in getting hold of both grab-irons and in getting both feet on the first step and that he was knocked off by the falling of the trap door. This was also denied. The weight of the testimony shows that he was not struck by the trap.

Upon a careful consideration of this evidence, it is apparent that without a difference of opinion all reasonable unbiased minds must agree that the cause of the accident was the unlawful attempt on the part of appellee to board a moving train.

Where one is injured because of his own negligent unlawful act, he can not recover damages of another who may also have been negligent.

The judgment of the Circuit Court is therefore reversed with a finding of fact to be incorporated in the judgment of this court, that the injury to appellee was caused by his own negligence.

Reversed with Finding of Fact.

2325

GENERAL No. 6548. APRIL TERM A. D. 1916. AGENDA No. 44

LOUISA KILLION,

Appellee.

vs.

MODERN WOODMEN OF AMERICA,

Appellant.

Appeal from the Circuit Court of Fulton County

202 I.A. 525

GRAVES, J.

On January 20, 1898, appellant issued to one Wellington Killion a benefit certificate in the sum of $2000, payable in the event of his death, and subject to its terms and conditions, to his wife Louisa H. Killion. All dues and assessments were duly paid by Wellington Killion, to the time of his death. On or about June 19, 1914 he went to one J. W. Lance, the clerk of the local camp of appellant at Table Grove, Illinois, which was the member's home camp, and told him that he wanted to change his beneficiary in his certificate and to make the same payable to his brother Robert Killion, stating as a reason for so doing that his wife Louisa had not treated him right. Mr. Lance not having the proper blank form used by appellant where members desired to change beneficiaries, promised to send for one and mail it to him at Fairfield, Iowa where he had said he was going to live in the future. On June 24, 1914, Wellington Killion went before Thomas S. Ward, clerk of the local camp of appellant at Fairfield, Iowa and executed what is called a waiver of lost certificate, asking that a new certificate be issued to him in which his brother Robert Killion should be named as beneficiary. The form used in attempting to make this change in beneficiaries was one prepared

by appellant and furnished to be used by members in suspension, and was known as form No. 7 1-2. When filled out it was forwarded together with the required fee to the head camp of appellant and was received there about June 26, 1914, was marked on the back, "Not acceptable," the fee was returned, and no new certificate was ever issued. Wellington Killion was not a member in suspension. On June 24, J. W. Lance, clerk of the camp at Table Grove, Illinois, having obtained a blank known as form No. 7, which it is conceded is the proper blank to be used by members not in suspension to obtain a change in beneficiaries, filled it out in part and sent it to Wellington Killion, at Fairfield in accordance with his promise. It was received by him after he had sent to the head camp the one prepared at Fairfield. The blank sent from Table Grove was not forwarded to the head camp. Wellington Killion died June 29, 1914, at Fairfield, Iowa, and both Louisa and Robert Killion submitted to appellant proofs of death. These proofs were not returned as objectionable, but were retained by appellant, and both claimed the sum of $2000. Neither claim was allowed and this suit in assumpsit was brought.

Appellant filed the general issue and gave notice that under that plea it would prove and rely on as a defense that it was a fraternal benefit society having a lodge system, ritualistic form of work and representative form of government, deriving its funds by assessments on its members; that the contract sued on provides that no action can be brought on that contract until after proofs of death

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have been filed with its head clerk and acted on by its Board of Directors, and that the Board of Directors had not passed on any proofs of the death of Wellington Killion and that Wellington Killion during his lifetime and on June 24, 1914 had changed his beneficiary in accordance with the by-laws, rules and regulations of and satisfactory to the society, by executing a "Waiver of lost certificate" in which he designated Robert Killion, his brother, to be the beneficiary in the place of Louisa Killion, his wife.

A trial was had before the court, a jury being waived. The finding was for appellee and judgment was rendered against appellant for $2100.

As appellant states in its brief that the entire case depends upon the issue whether appellee or Robert Killion is the real beneficiary under the contract sued on, the question whether this suit was brought before the proofs of death had been acted on is eliminated.

Louisa was the original beneficiary and unless the deceased by his act of June 24, 1914, succeeded in cancelling the original certificate sued on and in naming his brother Robert in her stead, she still is such beneficiary. That he desired and had a right to make such a change and undertook to accomplish it is not disputed. The only question is did he succeed in making the change? That he did succeed is set up by appellant as an affirmative defense. The burden is on appellant to prove that defense. By its notice of defense appellant asserts that it has by-laws, rules and regulations and that Wellington

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Killion "in accordance with said by-laws, rules and regulations" executed a waiver of lost certificate, in which he waived all rights under the lost certificate and asked that a new certificate be issued in which his brother Robert should be named as beneficiary. The only way the Circuit Court could know that the change of beneficiaries had been accomplished in accordance with the by-laws, rules and regulations of the society was by an inspection of the same. They were not introduced in evidence. They were offered in evidence by appellee but were excluded on the objection of appellant. The court was deprived thereby of any means of determining that issue in favor of appellant. There are, however, items in evidence strongly tending to prove that no change of benficiaries was ever made in accordance with such by-laws, rules and regulations. On the back of the certificate is printed a blank form designed to be used for the purpose of changing beneficiaries. It is so framed that when filled out and signed

it is an offer by the member to surrender the certificate and a request for the issuance of a new one in which a new beneficiary mentioned in the request shall be named. Below this blank is a form of an affidavit with names and dates blank which is to be used in case the signature of the member to the request for change in beneficiaries is not attested by the clerk of the member's home camp. These blanks were not filled out or signed. [The form used by the member No. 7 1-2 was designed to be used "when former member makes new application for membership," and as filled out and signed in part recites—"I, Wellington L. Killion, certify that I formerly held beneficial membership in Laurel Hill Camp No. 660, Modern

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Woodmen of America, located at Table Grove, State of Illinois, **Which membership was terminated by suspension more than six months previous to the date hereof:** that I was adopted as a member of Laurel Hill Camp No. 660 at Table Grove, Ill." (The part of the foregoing quotation in italics is omitted from the supposed copy of the instrument in the abstract.) This so-called waiver of lost certificate further recites in substance that the original certificate is lost or destroyed, that he cannot find it; that he has not transferred it or assigned it and that it is not to his knowledge held by any person. This blank form No. 7-1-2 contains a blank certificate to be filled out and signed by the clerk of the home camp in which he is to certify that the signature of the member to the petition is genuine and that the petitioner is an accepted applicant for membership in the home camp and has complied with all the requirements of the society's by-laws, etc. Following this blank certificate is a blank affidavit to be filled out, signed and sworn to in case the above mentioned certificate was not signed by the clerk of the home camp.] The petition or waiver executed was manifestly untrue. Wellington Killion was not a member under suspension. The certificate of the genuineness of the signature etc. was not signed by the clerk of the home camp and the affidavit was not signed by any one.

The evidence further shows that the society had prepared and furnished to its members when asked for blanks known as No. 7, to be used by members who were in good standing but who had lost their

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certificates and desired new ones with the same or a new beneficiary. This blank differed from the blank used in several respects, notably that he was referred to in it as a member in good standing instead of under suspension, he was called "neighbor" instead of "Mr.," and the waiver proper contains many pledges and promises and a guarantee of indemnity that are not contained in the form used.

It is conclusively apparent that the form used was not the one intended by appellant to be used to secure the change of beneficiaries in a certificate held by a member in good standing as Wellington Killion confessedly was, or in other words that the member did not pursue the

course pointed out by the association to procure a change in beneficiaries. The letter of the general attorney of appellant written July 29 1914, clearly shows that it was for the reason that the application for a change of beneficiaries was not made on the right blank and in the right form, that it was not honored.

Appellant complains that the court refused to permit it to prove its usual course of business in changing beneficiaries. By its notice of special defense, appellant has formally asserted the existence of by-laws, rules and regulations of the society governing the manner of changing beneficiaries and the proof in the record also shows that to be true. It may be conceded that proof of a general custom of appellant might be admissible to bind it in some way, but we have been shown no authority or reason for holding it competent for it to prove for its own benefit a general custom contrary to its own by-laws, rules

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or regulations. If the claimed general custom is in accord with the by-laws, rules and regulations, then the best evidence of what it is, is the by-laws, rules and regulations themselves. The court did not err in excluding this evidence.

Appellant has cited a large number of authorities for the purpose of showing that the change of benficiaries must be considered as made when the member has done all in his power to accomplish that change. There are at least two reasons why those authorities are not in point here. First, these holdings are all based on the premise that the member has done all he could do, **in the manner pointed out by the by-laws, rules and regulations of the society,** which we have seen the proof does not show was done in the case at bar. Second, in Illinois wher the distinction between common law and equity jurisdiction is maintained, the courts of law dispose of law suits by the rules of the common law, which enforces a contract as it is found to exist. The equitable rule that looks upon that as done which should have been done, cannot be applied in actions at law. If appellant had desired to have equitable principles applied it should have filed its Bill of interpleader and brought the money into a court where the respective claimants could have themselves presented their equitable claims.

It is also urged as a reason why the judgment in this case should be reversed that the court refused to permit appellant to prove why one of the employees in the office of the head clerk of the society failed to issue a new certificate naming Robert Killion as beneficiary. There was no error in that ruling. The material fact to be established

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was what was done or not done, not the reasons why the act was omitted or preformed.

We see no error in the record and the judgment is therefore affirmed.

Judgment Affirmed.

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2326

GENERAL No. 6551. APRIL TERM A. D. 1916. AGENDA No. 17

JAMES W. GULLETT,
Appellee.
vs.
GEORGE W. LEAVERTON and GRACE LEAVERTON,
Appellants

Appeal from the Circuit Court of Sangamon County.

202 I.A. 527

GRAVES J.

This is an action for fraud and deceit, practised upon appellee in inducing him to buy a city lot. The sufficiency of the declaration was determined by this court in this same case on a former appeal, reported in 188 Ill. App. 66, where it is said—"To recover for fraud and deceit all that is necessary to aver and prove is that the representations made were untrue. that the party making them knew them to be false, that the representations made were material to a transaction and were made with intent to deceive, that the party to whom the representations were made relied upon them as true, and was induced to act by reason of such representations and was misled and damaged thereby." The suit was against a man and his wife. The wife was the owner of the property and the husband was the agent of the wife in selling it. It was the representations of the husband that it is claimed were fradulent, but the wife ratified the acts of her husband and accepted the proceeds of the sale. The judgment was against both defendants for $400.

The evidence was conflicting but strongly tended to establish

all that this court said when the case was here before, was necessary to aver and prove to entitle appellee to recover, and we are not prepared to say the verdict was not warranted by the evidence.

The only serious question is whether the wife can be held liable for the fraud and deceit of the husband. There is no doubt that he was the agent of his wife to sell the property and that he was acting within the scope of his authority in procuring the sale. The verdict has settled the question that fraudulent representations were made, that they induced appellee to make the purchase, that they were false and that appellee was damaged thereby. Misrepresentations of the agent, made when he is acting within the scope of his authority or when the principal has knowledge of the deceit will bind the principal. **Linn v. Sigsbee** 67 Ill. 76. **Cook v. School comm.** 1 Gil. 537.

The proof tends to show that the wife knew of the false representations, for the husband testified about having conversations with his wife about the sale, and that he was trying for two years to sell it. It further shows that the false representations were contained in an advertisement of the lot for sale, and Mrs. Leaverton did not take the

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GENERAL No. 6559. APRIL TERM A. D. 1916. AGENDA No. 50.

REBECCA WORTMAN,

Appellee.

vs.

E. C. TROTT, et al,

Appellants

Appeal from the Circuit Court of McLean County

202 I.A. 528

GRAVES, J.

This is an appeal from a judgment for $500 in favor of the plaintiff in a personal injury suit. Appellee claims to have been struck by the automobile of appellants, while crossing a street in Bloomington. The evidence as to how the accident occured is conflicting. The verdict of the jury for the plaintiff is a finding that the injury was caused by the negligence of appellants and that appellee was not guilty of contributory negligence, and we think the evidence fairly tends to support the verdict. The testimony fairly tends to show that when appellee was crossing the street she was struck from behind by the side of the car of appellants while she was walking forward. There is no pretense that she backed into the car. It follows of necessity that the car must have been driven at such an angle across the wake of appellee as to overtake her with the side of the car after its front end had passed her. That circumstance alone warrants the finding of the jury fixing the responsibility for the injury on appellants. Still another circumstance strongly tends to support the verdict. The evidence shows that appellee was crossing the street from east to west and was within four or five feet of the west curb when the car coming from the south struck her. This evidence con-

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clusively shows that the driver of the car was not observing the law of the road as provided by the ordinances of the city of Bloomington, but was travelling on the left hand side of the street instead of the right as is required by the said ordinances. If it had been driven on the right side where it should have been, appellee would not have been struck by it. A foot passenger always has an equal right with vehicles to the use of all of that part of the streets used by the public travelling on foot in crossing the streets. 3

Appellant's refused instruction "P" was properly refused. It relates to the rule of law controlling inevitable accidents. There is no evidence in this record to base a claim upon that the injury complained of was the result of inevitable accident.

Appellant's refused instruction "O" was a correct instruction. Its refusal was however not error, because the same proposition was included in at least one other instruction given at the instance of appellants and it is not error to refuse to give duplicate instructions.

Appellant's refused instruction "Q" is bad and was properly refused because it singles out appelee and directs the jury how to weigh her

testimony. Instructions of this kind should be so drawn as to apply to all witnesses of the same class. If they are not so drawn it is not error to refuse them. **Phenix Ins. Co. v. LaPorte** 118 Ill. 384.

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Penn. Co. v. Versten 140 Ill. 637, **Parlin v. Frufrouch** 65 Ill. App. 174. Arnold v. Pucher 83 Ill. App. 182.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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GENERAL No. 6562. APRIL TERM A. D. 1916. AGENDA No. 53

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellees.

vs.

MRS. A. H. BROWN,
Appellant.

Appeal from the County Court of Macoupin County

202 I.A. 530

GRAVES, J.

This is an appeal from a judgment in the county court of Macoupin County for $100, in an action brought to recover the penalty provided by section 10 of Chapter 91 R. S. for practising medicine without a license. It is not denied that if appellant was practising medicine she was doing so in violation of law, but it is insisted that the evidence does not show that she was practising medicine. Section 7 of Chapter 91 R. S. provides in part that "Any person shall be regarded as practising medicine within the meaning of this act who shall treat or profess to treat, operate on or prescribe for any physicial ailment * * *." In **People v. Dunn** 255 Ill. 289 the Supreme Court held that one who diagnosed an ailment of a prospective patient and offered to treat it was practising medicine within the meaning of Section 7, Chapter 91 R. S. In **People v. Trenner** 144 Ill. App. 275 the Appellate Court of the Second District held that one who without a license to practise medicine professes and undertakes to heal by the laying on of hands together with mental suggestion comes within the provisions of the law requiring a license to practise medicine. That opinion was cited with approval by the Appellate Court of the First

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District in **People v. Moser** 176 Ill. App. 625-628, in which case that court holds that "the statute evidently means to include any person who undertakes to prescribe for or treat a patient for any ailment, regardless of the real or fancied presence of the ailment." In **People v. Gordon** 194 Ill. 560 and in **Eastman v. People** 71 Ill. App. 236 it is held that the practice of osteopathy is prartising medicine within the meaning of the statute. In **Jones v. People** 84 Ill. App. 453 and in **People v. Jones** 92 Ill. App. 447, massage treatment when employed to treat disease and advertised to produce cures is held to be practising medicine.

The proof in the record shows that ~~appellant~~ defendant treated Miss Meta Smith for stomach trouble and nerves for a long while by rubbing her with her hands and told her to eat fruit and to take deep breaths many times daily. She also told her she was getting along all right and collected one dollar per treatment. Mrs. Nick Johnson testified that ~~appellant~~ defendant treated her for nervousness for three years by rubbing her all over; that before starting the treatment ~~appellant~~ defendant asked witness questions about her trouble, "just about like a regular doctor would" and told her what the

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trouble was; that it was nervousness and that witness paid her one dollar and forty cents per treatment.

Mrs. Wm. Fries testified that appellant treated her by rubbing for constipation and charged her one dollar per treatment.

Mrs. Kress testified that appellant treated her by rubbing; that she had been ailing and had been to a doctor about it; that appellant told witness her trouble was constipation and that she paid

(Page 2)

her a dollar and a half per treatment.

Mrs. Long testified that appellant treated her for nervousness three times a week for five months and occasionally for three months more, by rubbing; that she told her she could cure her; that she would guarantee that witness would get well; that witness went to her as an osteopath and told her so, and appellant took her as her patient as an osteopath; that she called the treatments osteopathic, said she was an osteopath; and gave directions as to what witness should eat; that appellant charged her one dollar and forty cents per treatment.

None of the testimony above referred to was denied by appellant, but she testified that she was a healer and used rubbing or massage, mental suggestion and prayer and gave directions as to diet and deep breathing.

We think the testimony in the record clearly brings the treatments given by appellant to her patients within the definition of practising medicine as laid down by the authorities cited.

Appellant, while admitting that the instructions are in accord with the holdings of the Supreme and Appellate Courts of this state complains that they do not state the law correctly. We hesitate to undertake in this opinion to abolish what has become the settled law of this state, but feel bound to follow the line of authorities cited even if they are not in accord with what appellant feels should be the law.

The judgment of the County Court is affirmed.

Judgment affirmed.

(Page 3)

-209
10/13/16
2329

GENERAL No. 6566. APRIL TERM A. D. 1916. AGENDA No. 56

HENRY HARBAUER,
Defendant in Error,
vs.
HELEN HARBAUER,
Plaintiff in Error.

Writ of Error to the Circuit Court of Sangamon County

202 I.A. 532

GRAVES, J.

This writ of error was sued out to review the action of the Circuit Court in granting to defendant a decree for divorce. [The defendant ~~in the divorce suit, plaintiff in error here~~ did not appear in the Circuit Court and the bill was taken as confessed as against her.] The evidence on which the divorce was granted was not preserved by certificate of evidence and all the decree shows as to the jurisdiction of the Court is the recital "and having heard the arguments of counsel and being fully advised in the premises and on consideration thereof doth find, that the Court has jurisdiction of the subject matter and of the parties * * *." No jurisdictional fact whatever is shown or found. Such a finding is not sufficient to sustain a decree where the evidence is not preserved in the record. In order that a court may have jurisdiction in a divorce case, the complainant must be an actual and bona fide resident of the county where he brings his suit and must have been a resident of the State for at least one year next before suit is begun, and these facts must affirmatively appear either by certificate of evidence or by specific findings in the decree. **Breckenridge v. Breckenridge** 232 Ill. 120.

(Page 1)

Ohman v. Ohman 233 Ill. 632.

The decree of the Circuit Court is therefore reversed and the cause is remanded to that court.

Reversed and Remanded.

(Page 2)

2330

GENERAL No. 6573. APRIL TERM A. D. 1916. AGENDA No. 62

IMPERIAL SEATING CO. FOR THE USE OF THE WISCONSIN SEATING CO.,
Appellees.

vs.

BLOOMINGTON OPERA HOUSE,
Appellant

Appeal from the Circuit Court of McLean County.

202 I.A. 533

GRAVES, J.

In 1909 appellant contracted with appellee for several hundred opera house chairs to be manufactured by appellee for appellant according to certain plans to be furnished. The chairs were to be set up ready for use by December 20, 1909, and appellant was to pay for them $1750 cash on completion. Appellant was to furnish plans to appellee 30 days before the date fixed for the opening of the opera house, in default of which appellee was to be released from furnishing the seats by December 20, 1909, and appellant was to give appellee at least seven days notice of the date eventually fixed by it for opening the opera house, during which time appellee was to have facilities, light and clear floor space for fitting the seats. If appellant was not ready for the chairs ten days before the date fixed for the opening of the opera house, it was to give appellee notice of such fact, and was to pay storage and insurance at Chicago rates for the full period of the delay, and in case it was not ready for the chairs one week before December 20, 1909, two-thirds of the $1750 should become due. The title to the seats was to remain in appellee for a time under certain conditions and the contract was to be recorded or not

as a chattel mortgage, at the option of appellee.

The opera house was not ready for the chairs one week before or on December 20, 1909, and for that reason they were not delivered at that time, and by the terms of the contract two-thirds of the consideration or $1166.66 then became due and payable.

On March 3, 1910 appellant gave notice that it would open its opera house on April 6, 1910. On March 28, 1910 appellant paid to appellee $200 to apply on the purchase price. The chairs were not all received by appellant by April 6, 1910 and the opening was postponed until the next day. Some of the chairs were not installed for a considerable time thereafter. Upon demand being made on appellant for payment, it was refused, appellant claiming that the chairs were not as ordered; that they were not delivered at the time agreed upon and that by reason of the failure of appellee to perform its contract on time and to furnish the kind of chairs ordered it had been damaged more than the contract price of the chairs. On February 23, 1914 suit was brought by appellee in replevin to recover the chairs on the theory that title had not passed to appellant, but later it was transferred to the chancery side of the docket and appellee filed its bill setting up the contract and its performance by ap-

pellee, and averring that it had been assigned to the Wisconsin Seating Company and that appellant had accepted the chairs and agreed to pay for the same; that the opera house was mortgaged to the Franklin Life Insurance Company for $10,000 and to the State Trust and Savings Bank. ostensibly to secure the payment

(Page 2)

of $15,000; that the F. & H. Amusement Company was a leesee when the suit was commenced; that Delmar Schnepp was lessee when the bill was filed and that one A. E. DeMange claims some interest in the opera house the nature of which was unknown to appellee. The prayer of the bill asked for an unsworn answer from all the parties named, to three interrogations seeking discovery as to the kind and extent of the interest of each and for a decree requiring appellant to pay the amount found due on the contract with interest from the time it matured to the date of the decree and in default of such payment that it be required to deliver up the 902 chairs delivered to it by appellee under the contract sued on and that the chairs be sold and a deficiency decree entered.

Appellant answered the bill admitting the making of a contract with appellee but denying that appellee preformed it, or that it, the appellant, failed to perform its part, and setting out various items of damage amounting to upwards of $2275. Nine issues of fact to be tried by a jury were formed. The jury in determining these issues found:—

1. That appellee did not fail to deliver the chairs ordered by December 20, 1909, or any subsequent date designated by appellant.
2. That appellant paid the expense of installing the chairs $95.58
3. That appellant paid for work and material in blocking up and fitting chairs 6.45
4. That appellant paid for advertising the opening on April 6, 1910. 5.60
5. That appellant expended money for railroad fare etc. 50.00
6. That appellant paid for camp chairs 74.35
7. That appellant paid freight charges and cartage on chairs 70.53

(Page 3)

8. That appellee did not furnish and install chairs that did not fit the floor plan.
9. That the market value of the chairs in question in appellant's operahous was $1750.00

Findings numbered 1, 8 and 9 were on motion of appellant set aside and the court, after refusing to resubmit the issues to a jury entered its decree in which appellee was allowed his full claim of $1750 against appellant, and appellant was allowed all the items allowed by the jury above enumerated, and an additional item of $485.00 for changing castings for 390 chairs in the balcony and also the item of $200 for cash paid appellee on account, making a total credit of $987.51, leaving a net sum due appellee on May 1, 1910 of $762.49 on which $212.83 interest is allowed from May 1, 1910 to the date of the decree, at 5 per cent per annum, making a total of $975.32 which the decree orders appellant to pay within 20 days and in default of such payment the sheriff is ordered to remove and sell the 902 chairs.

Both appellant and appellee have assigned errors.

With the exception of a few minor matters appellant's counsel have contented themselves with arguing the facts for the purpose of inducing this court to hold that the findings of the chancellor and the decree entered by him are contrary to the manifest weight of the evidence. The findings of a chancellor on questions of fact particularly when such findings are based on, and are in accord with, the verdict of a jury, are given great weight in courts of review, and will never be set aside unless they are clearly and manifestly con-

(Page 4)

tary to the weight of the competent evidence.

A review of the evidence bearing on all these issues would unduly extend this opinion. It is enough to say we have carefully examined it all and are not prepared to hold that the finding and decree of the court is manifestly contrary to the weight of the evidence.

Appellant has not claimed that it should not pay interest on any amount which it actually owes appellee, for the full time for which the same has been overdue, but insists that the interest charge is for at least one month too long. If that were true it would be an overcharge of $3.17 which would scarcely be sufficient to warrant a reversal of the decree to correct, but upon a careful consideration of the evidence it seems apparent that, if there has been any error in computing the time for which interest has been charged, it is in favor of appellant, for the interest is computed from May 1, 1910, while under the contract as applied to the facts shown by the record two-thirds of the original charge of $1750 became due and payable on December 20, 1909, and if interest is collectable at all, it would certainly be collectable for four months and twenty days longer than the decree has charged appellant with interest, instead of one month less. We cannot reverse this decree on the ground that it is manifestly contrary to the proofs.

Evidence was offered by appellant to prove what the receipts of the old opera house were at its opening in 1890, for the purpose of comparing the same with the receipts of the opening night of the

(Page 5)

new one in April 1910, as a basis of estimating appellant's damage. It was properly excluded. A mere statement of the proposition shows its absurdity.

At the trial appellee introduced the contract and rested. Appellant then moved for a directed verdict on the ground that in order to make its case in chief appellee should have shown preformance of the contract. Be that as it may, it is too late now to take advantage of the supposed error. If appellant had desired to rely on that point for reversal, it should have rested its case then and there. This it did not see fit to do, but proceeded to introduce evidence on the question of the performance

of the contract. The case must be determined by this court on all the evidence in the record here presented, as well that presented by appellant after his motion for a peremptory instuction was denied, as before.

Appellee with reference to its cross errors contends that as long as appellant was in default in not paying two thirds of the contract price for the chairs when it failed to take them in December 1909, that it cannot be heard to complain that appellee has failed to perform its part of the same contract. It is undoubtedly true that if appellee, in December 1909 when appellant failed to make its stipulated payment, had seen fit to treat the contract as abandoned, it could have done so and been safe from any claim for damages by appellant, but when it undertook later to perform it and to furnish the chairs, it was bound to furnish and install form it and to furnish the chairs, it was bound to furnish and install them according to the terms of the contract or respond in damages for its failure so to do.

(Page 6)

The other points raised by the cross errors turn on questions of fact. As to such matters we see no reason to disagree with the findings of the trial court.

The decree of the Circuit Court is affirmed.

Decree affirmed.

(Page 7)

20 f
10/3/16
Rehg denied
(Dec 2, 1916)
2332

GENERAL No. 6579. APRIL TERM A. D. 1916. AGENDA No. 68.

GEORGE LOWERY,

Appellee.

vs.

MACK ASHTON,

Appellant

Appeal from the Circuit Court of Macon County

202 I.A. 536

GRAVES, J.

This is an appeal from a judgment for $1000 in an action of trespass for an assault and battery.

Because this judgment must be reversed for errors in instructions and the cause remanded for a re-trial on the merits, we will refrain from discussing the facts.

The defendant plead the general issue and son assault demesne.

One instruction given at the instance of appellee told the jury in part "You have a right to take into consideration his health prior to the assault, complained of and his health since such assault, if shown by the evidence, and allow him such sum as you may believe from the evidence will compensate him for any such injuries * * *." This part of the instruction assumes that the assault was made and that appellee was damaged and authorizes the jury to estimate damages in the light of a comparison of his health before and after the assault: regardless of whether the change in health was due to the assault or not.

(Page 1)

Another instruction tells the jury that they "may take into consideration that the plaintiff was again struck by the defendant while he, the defendant, was not acting in self defense." By this instruction the court assumed the fact to be that appellant again struck appellee and that he did so when appellant was not acting in selfdefense.

In numerous other instructions it was assumed as a fact that an assault was made. It cannot be doubted that these erroneous instructinos were harmful to appellant.

The judgment of the Circuit Court is therefore reversed and the cause is remanded to that court.

Reversed and remanded.

(Page 2)

Opinion filed after granting Rehearing and case resubmitted Nov. 16, 1917.

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

2333

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.
THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ~~Thirteenth~~ Eighth day of November, A. D. 1916, January A.D.1917 there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

202 I.A. 538

Rust & Swift,

Appellees

vs.

No. 4
October
March Term, 1916.

The Illinois Southern Railway Co.,

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. W. E. HADLEY

Term No. 4 In the Appellate Court Agenda No. 23

of Illinois, Fourth District.

October Term, A. D. 1916.

Marshall Rust and James D. Swift, Co-partners under the firm name of Rust & Swift, successors to Rust, Swift & Company,

Appellee

vs.

The Illinois Southern Railway Company, a Corporation.

Appellant

Appeal from Randolph.

Don't put in the underscores

Opinion by Boggs, J.

On March 23, 1911, ~~appellant~~ defendant entered into a contract with Rust, Swift & Company, a co-partnership, composed of Marshall Rust, James D. Swift and W. H. Swift, contractors, to build a railroad incline in the Mississippi river on the Illinois side opposite Little Rock, Missouri, so that the cars of the railroad could be run onto a ferry boat and thereby transferred to its connecting track at Little Rock. In addition to the incline the contracting company was to construct a wooden trestle to connect that incline with the Illinois shore of the river, together with a drift fender and pile dike for the portection of said incline and trestle, from the waters of the river; and to do all work required for the safety of the incline, to be built in compliance with plans and specifications prepared by Julius Pitman, the engineer in charge or as the plans might be changed by him during the

progress of the work. The contract provided that the contractor should not assign or transfer the same or sub-let any part of it without the consent of the engineer in charge. In regard to the payments to be made for the work the contract read as follows: "All payments under this contract shall be made upon certificates of the engineer in charge; said certificates to be made out and given in the following manner. About the first of each month, during the progress of the work, at the request of the contractor, the engineer shall cause approximate estimates to be made of the amount of the work then done and of the amount of material delivered and of the relative value thereof at the prices hereinbefore named; after the first, monthly estimate is given, the contractor shall furnish satisfactory evidence to the engineer in charge that all bills for labor and material used during the preceding months have been paid. From the total value of the work done, as approximately estimated by the engineer, he shall deduct ten per cent and all sums previously paid or rightfully retained under the contract, and he shall further deduct an amount sufficient in his opinion for the payment of all unpaid bills for labor and material, the remainder after such deduction, he shall certify as then due to the contractor."

Section 7 of the general stipulations contained in the contract gave the engineer in charge of the work, certain authority as follows: "To prevent all disputes and litigation, it is further agreed between the parties hereto that the engineer in charge shall in all cases determine the

amount or quality of the several kinds of work which are to be paid for under this contract and he shall decide all questions which may arise relative to the execution of this contract on the part of the contractor and his estimates and decisions shall be final and conclusive." Section 14 of the general stipulations provided as follows: "The contractor shall be held responsible for the safety and protection of every part of his work until its completion and acceptance and any injury to the work resulting from flood, scour, undermining of the river bank or bed, or other causes, before such acceptance must be made good by him."

On May 12, 1913, ~~appellees filed~~ a petition to enforce a lien upon the railroad and property of ~~appellant~~ defendant, for the amount claimed to be due ~~them~~ the petitioners under their contract and for material furnished and extra work done within six months prior to the filing of the petition, ~~claiming a total~~ amount earned by them of $107,723.29, of which there had been paid to them the sum of $87,544.23, leaving a balance of $20,179.06 which they claim to be due with interest thereon, from February 11, 1913. It appears from the petition that ~~it~~ was filed by Marshall Rust and James D. Swift co-partners, under the firm name of Rust & Swift as successors to Rust, Swift & Company, and the contract was set out therein in haec verba. On September 6, 1913, appellant filed an answer to the petition, denying each and every allegation therein and asking that the same be dismissed. Appellees filed a replication thereto and thereafter appellant filed an amended answer in which it denied that it had any contract with appellees but stated that said contract was made by it with

~~the~~ W. H. Swift, who was a partner at the time ~~of making~~ the contract was entered into and, at the time of the filing of the petition, ~~had~~ acted with his consent in the form and contract.

[illegible]

Rust, Swift & Company, a firm composed of appellees and W. H. Swift; that the total value of the work done and material furnished was $100,425.42, which sum was the total of the final estimate made by Julius Pitzman, the engineer in charge and that said contracting company did extra work amounting to $3016.96, making a total of $103,442.38 as shown by said estimate and that said company has received thereon $87,544.23; that appellant had rightfully retained under said contract, the sum of $6,888.46 as shown by said estimate, leaving a balance due the contractor of $8,609.69, provided there was no counterclaim. The answer then proceeds to set up three counterclaims as follows: (1) The sum of $10,758.44 for labor and material furnished by appellant for the purpose of protecting said railroad trestle and incline from injury from floods in the Mississippi river in the spring of 1912, when said work was imperiled by the destruction of a part of the fenderdike, which was in process of construction by said contractor under said contract. (2) The sum of $1421.17 for machinery loaned and transportation services furnished by appellant to the contractor at its request while it was engaged in prosecuting said work under the contract. (3) The sum of $5500 for damages to appellant occasioned by vexatious delay on the part of the contractor in the completion of the contract.

On December 26, 1913, replication was filed to the amended answer by appellee and afterwards the cause was referred to the master-in chancery to take the proofs and report the same and his conclusions. The master subsequently made his report to the court, to which both complainants and

defendant filed exceptions and by stipulation of the parties it was agreed that the conclusions of the master should be disregarded and the cause tried by the court upon the proof taken before the master without regard to his conclusions. The court in its decree found that the contract of March 23, 1911, and two supplemental contracts, one dated July 17, and the other October 2, 1911, entered into between the parties and relating to the work to be done under the original contract, were entered into and fully performed; that the total value of the work and material furnished in the construction of the railroad trestle, incline, pile dike and drift fender, was $103,441.30 and that the amount of money paid by appellant on account of said work was $87,544.23; that appellant was entitled to a further credit for engine services, coal and engine supplies of $476.87; that appellant was also entitled to its claim of $1421.17 for work done and materials furnished by appellants to said contractors, composing appellants counterclaim No. 2 above referred to, except $427.70, which had been charged by appellants on account of expenses, transportation, wages and material needed to complete what was known as the Kellogg incline which was disallowed, leaving the sum of $993.47 as the balance of this counterclaim for which appellant was entitled to take credit. The court in its decree rejected the claim of appellant of $10,758.44 for work done by it to protect the trestle and incline above referred to, as its first counterclaim and also the claim of $5500 damages on account of delay in the completion of said work above referred to

as appellant's third counterclaim, and found the balance due contractors to be $14,427.81, with interest at the rate of five per cent per annum from the 29th day of October, 191[illegible], amounting to $1837.54, making a total of $16,265.35 for which amount a decree was entered in favor of appellees and made a lien upon its property as asked for in the petition.

The answer of appellant pleaded a defect of parties, insisting that W. H. Swift, who was a member of the firm when the contract was signed, should have been made a party to this suit and prayed that the cause should not proceed until said W. H. Swift was made a party thereto. The trial court refused to make such order and the first question presented by appellant on this appeal is whether that court erred in refusing to dismiss the bill. It appeared from the proofs that at the time the contract was entered into W. H. Swift had a one-tenth interest in the partnership but was not actively engaged in carrying on its business and that before the completion of the contract, he retired from the firm, relinquishing all his interest therein and in the said contract. Appellees sued as successors to the original contracting firm as shown on the face of their petition. The contract provided that the contracting company should not assign or transfer the contract or sublet any part of it without the consent of the engineer in charge but the retirement of William H. Swift from the contract, does not appear to us to have been an assignment or a transferring or subletting of the contract as contemplated by this provision thereof. The objection raised is a technical one

at best and as William M. Swift had no interest whatever in the money sought to be recovered in the action and as the failure to make him a party did not affect the interests of appellant, or the trial of the suit in any way, we do not think the failure to make him a nominal plaintiff was a substantial error calling for the reversal of the decree.

Appellant contends that the court should have allowed all three of the counterclaims or set offs, and in support of such contention relies on the final report of the engineer in charge of the work, which it insists by force of provision 7 of the contract heretofore quoted, was final and not subject to review by the court.

This report made by the engineer found that the total amount of work and labor furnished by appellee was $103,442.38 and that the total payments made by appellant aggregated the sum of $87,544.23. Said engineer further reported that appellant was entitled to a credit of $476.87 for engine services, coal and engine supplies furnished appellee (This credit was allowed by the court in its decree). Said engineer also allowed appellantthe following additional credits for labor, etc., on the incline (1) For labor, etc. on Kellogg incline in July and August, 1912, $773.37. (2) For driving 21,568 lineal feet of piling driven in fender dike, at 16¢ per lineal foot, $3,444.48. (3) For piling washed out of fender dike in April 1912 and not recovered $2,193.74, making a total of credits allowed by said engineer in addition to the cash payments of $87,544.23, of $6,888.46. The balance found by said engineer to be owing

appellee was $9,009.69.

Said engineer closed his report with the suggestion that appellant might have a claim for damages in consequence of the delay in the completion of the work, and also that under a proper construction of the contract appellant might be entitled to recover from appellee the cost of labor and material furnished by it to protect the work and prevent the washing out of the southern part of the incline. It is conceded by both parties to this proceeding that the final estimate of the engineer is binding and conclusive on said parties so far as his estimate and report was confined to the matters submitted to him to be determined by the contract above referred to, but said parties do not agree with reference to the extent of the right of said engineer to determine the matters in controversy between them. Appellant contends that the engineer under the provision of section 7 of the contract hereinabove quoted gave the engineer the power to determine, not only the amount and value of the work and materials furnished by appellee under the contract entered into between them, but that it also gave to said engineer the right and power to determine all matters of set-off allowed by him in his report. We have examined the report of said engineer in connection with the contract entered into between said parties, the plans and specifications for the work covered by the same, together with the evidence in connection therewith and are of the opinion that the powers given to said engineer was broad enough to include his right to determine with reference to the credits or counterclaim of appellant in connection with the item of

$3,444.48 for driving piling in the fender dike and for the item of $2,193.74 for piling washed out and not recovered in said fender dike and also the credit of $773.37 allowed by said engineer to appellant for work put in on the Kellogg incline in July and August 1917, and in our judgment said credits should have been allowed to appellant in addition to the credits allowed him by the decree of said Court.

The record discloses that in April 1917, the fender dike that was being constructed by appellee under said contract was destroyed by a Mississippi flood and a large part of the piling was swept away. The credits above mentioned for piling washed away and not recovered and for driving piling, was to cover the materials and the work in and about the said fender dike, the use of which was lost to appellant and was never replaced by appellee. It is appellee's contention in connection with this matter that the contract between appellant and appellees was a divisible contract and that said fender dike had been constructed by appellees and had been accepted by the engineer before it was destroyed by the flood, and that therefore no credit can be allowed therefor. On the other hand, appellant insists that the contract was a unit and that the work to be constructed by appellee under the contract was to be completed in its entirety before the final estimate and acceptance of said work by the engineer, and that there was no acceptance of said fender dike.

We are of the opinion that said contract was a unit on entirety and that there could be no final acceptance

of any part of said work until the entire work to be performed under said contract had been completed.

Said contract in addition to the sections quoted also provides: "Whereas the railroad (appellant) did let unto the contractor (appellee) the work of building a railroad trestle, incline and all necessary work in connection therewith. Now, therefore, in consideration of the payments and covenants hereinafter mentioned, to be made and performed by the said railroad the contractor hereby covenants and agrees to build a railroad incline in the Mississippi River opposite to Little Rock, Missouri, to build a wooden railroad trestle to connect said incline with the main shore of Illinois and to build a drift fender and pile dike for the protection of said incline and trestle, and to do all work required for the safety of the incline, to be built in compliance with the plans and specifications etc." Said contract further provides that "when all work embraced in this contract is fully completed agreeably to the specifications and stipulations herein contained, and accepted by the engineer in charge, said engineer shall cause a final estimate to be made of the amount and value of said work, ... from the total amount so found, he shall deduct all sums previously paid or rightfully retained under this contract, and certify the remainder as then due."

Our holding that the acceptation of the work by the engineer and the final estimate to be made by him was only to be made when the work in its entirety had been completed is supported by the reasoning of the Supreme Court in the following cases: Chicago v. Sexton, 115 Ill. 230; Norris vs. Tibaux, 159 Ill.627; Grace v. Oakland Bldg. & Loan Assn. 166 Ill.637;

Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill.233. In Huyett & Smith Mfg. Co., v. Chicago Edison Co., supra, the court at page 240 says:

"Where the law imposes a duty upon any one, inevitable accident may excuse the non-performance, for the law will not require of a party what, without any fault of his, he becomes unable to perform. But where the party, by his agreement voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the non-performance of it will not be excused by accident or inevitable necessity, for if he desires any such exception he should have provided for it in his contract."

The trial court in our judgment properly disallowed the counterclaim of appellant for $14,758.48 for labor and materials furnished by it for the purpose of protecting said railroad trestle and the incline from injury from floods, as said labor and material was not used in constructing or replacing any part of the work contracted to be performed by appellee.

We are further of the opinion that the court was correct in disallowing the counterclaim of $55[illegible], claimed by appellant as damages for delay on the part of appellee in constructing the work to be performed by it under said contract. The contract does not provide for damages for delay, but does provide that in the event that appellee shall fail to construct the work in accordance with its contract, appellant may upon giving notice to appellee to that effect take over the whole or any part of said work and construct the same, deducting from the contract price the extra cost of

such work so constructed by appellant. Appellant did not give such notice and did not proceed in the manner required by the contract, and it would, therefore, not be entitled to damages for such delay. We think, too, that the record discloses that notwithstanding the provisions of the contract, that appellant by its conduct waived the right to claim damages for delay.

For the reasons set forth the decree of the trial court will be reversed and the cause will be remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

Not to be reported in full.

such work as contracted by appellant. Appellant did not give such notice and did not proceed in the manner required by the contract, and it would; therefore, not be entitled to damages for such delay. It also, has, that the second clause of said contract making the prevalence of the contract, that appellant by its conduct waived the right to claim damages for delay.

For the reasons set forth, the decree of the trial court will be affirmed and the cause will be remanded for further proceedings in conformity with the views herein expressed.

Affirmed and remanded.

Set to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 6th day of November, A. D. 1916.

Clerk of the Appellate Court.

ION

First Opinion

Rehearing Granted May 25, 1916.

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Marshall Rust and James D. Swift,
Co-partners under the firm name
of Rust & Swift, successors to
Rust, Swift & Company,
Appellees.

vs.

No. 63.

October Term, 1915

The Illinois Southern Railway
Company, a Corporation,
Appellant.

ERROR TO
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. W. E. HADLEY.

Term No. 63. October Term, 1915. Agenda No.55.

Marshall Rust and James D. Swift, Co-Partners under the firm name of Rust & Swift, successors to Rust, Swift & Company,

Appellees

v.

The Illinois Southern Railway Company, a Corporation.

Appellant.

Appeal from

Randolph.

Opinion by Higbee, P. J.

----oOo----

On March 23, 1911, appellant entered into a contract with Rust, Swift & Company, a co-partnership, composed of Marshall Rust, James D. Swift and W. H. Swift, contractors, to build a railroad incline in the Mississippi river on the Illinois side opposite Little Rock, Missouri, so that the cars of the railroad could be run onto a ferry boat and thereby transferred to its connecting track at Little Rock. In addition to the incline the contracting company was to construct a wooden trestle to connect that incline with the Illinois shore of the river, together with a drift fender and pile dike for the protection of said incline and trestle, from the waters of the river; and to do all work required for the safety of the incline, to be built in compliance with plans and specifications prepared by

Term No. 63. October Term, 1913. Agenda No. 53.

Maxwell Hunt and James D. Swift, Co-partners under the firm name of Hunt & Swift, successors to Hunt, Swift & Company,

Appellees

v.

The Illinois Southern Railway Company, a corporation.

Appellant.

Appeal from Vandalia.

Opinion by Higbee, P. J.

---oOo---

On March 27, 1911, appellant entered into a contract with Hunt, Swift & Company, a co-partnership, composed of Maxwell Hunt, James D. Swift and T. D. Swift, contractors, to build a railroad incline in the Kaskaskia river on the Illinois side opposite Little Rock, Clarke, so that the care of the railroad could be run onto a ferry boat and thereby transferred to its connecting track at Little Rock. In addition to the incline the contracting company was to construct a wooden trestle to connect that incline with the Illinois shore of the river, together with a draft fender and pile dike for the protection of said incline and trestle, from the waters of the river; and to do all work required for the safety of the incline, to be built in compliance with plans and specifications prepared by

Julius Fitzman, the engineer in charge, or as the plans might be changed by him during the progress of the work. The contract provided that the contractor should not assign or transfer the same or sub-let any part of it without the consent of the engineer in charge. In regard to the payments to be made for the work the contract read as follows: "All payments under this contract shall be made upon certificates of the engineer in charge; said certificates to be made out and given in the following manner. About the first of each month, during the progress of the work, at the request of the contractor, the engineer shall cause approximate estimates to be made of the amount of the work then done and of the amount of material delivered and of the relative value thereof at the prices hereinbefore named; after the first, monthly estimate is given, the contractor shall furnish satisfactory evidence to the engineer in charge that all bills for labor and material used during the preceding months have been paid. From the total value of the work done, as approximately estimated by the engineer, he shall deduct ten per cent and all sums previously paid or rightfully retained under the contract, and he shall further deduct an amount sufficient in his opinion for the payment of all unpaid bills for labor and material, the remainder after such deduction, he shall certify as then due to the contractor."

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Julius Kitzmann, the engineer in charge, or the plans

authority as follows: "To prevent all disputes and litigation, it is further agreed between the parties hereto that the engineer in charge shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under this contract and he shall decide all questions which may arise relative to the execution of this contract on the part of the contractor and his estimates and decisions shall be final and conclusive." Section 14 of the general stipulations provided as follows: "The contractor shall be held responsible for the safety and protection of every part of his work until its completion and acceptance and any injury to the work resulting from flood, scour, undermining of the river bank or bed, or other causes, before such acceptance must be made good by him".

On May 12, 1913 appellees filed a petition to enforce a lien upon the railroad and property of appellant, for the amount claimed to be due them under their contract and for material furnished and extra work done within six months prior to the filing of the petition, claiming a total amount earned by them of $107,723.29, of which there had been paid to them the sum of $87,544.23, leaving a balance due of $20,179.06 which they claim to be due with interest thereon, from February 11, 1913. It appeared from the petition that it was filed by Marshall Rust and James D. Swift co-partners, under the firm name of Rust & Swift as successors to Rust, Swift & Company, and the contract was set out therein in haec verba. On September 6, 1913, appellant filed an answer

to the petition, denying each and every allegation therein and asking that the same be dismissed. Appellees filed a replication thereto and thereafter appellant filed an amended answer in which it denied that it had any contract with appellees but stated that said contract was made by it with Rust, Swift & Company, a firm composed of appellees and W. H. Swift; that the total value of the work done and material furnished was $100,425.42, which sum was the total of the final estimate made by Julius Witzman, the engineer in charge and that said contracting company did extra work amounting to $3016.96, making a total of $103,442.38 as shown by said estimate and that said company has received thereon $87,544.23; that appellant had rightfully retained under said contract, the sum of $6,888.46 as shown by said estimate, leaving a balance due the contractor of $9,009.69, provided there was no counterclaim. The answer then proceeds to set up three counterclaims as follows: (1) The sum of $10,758.44 for labor and material furnished by appellant for the purpose of protecting said railroad trestle and incline from injury from floods in the Mississippi river in the spring of 1912, when said work was imperiled by the destruction of a part of the fender dike, which was in process of construction by said contractor under said contract. (2) The sum of $1421.17 for machinery loaned and transportation services furnished by appellant to the contractor at its request while it was engaged in prosecuting said work under the contract. (3) the sum of $5500 for damages to appellant occasioned by vexatious delay on the part of the

contractor in the completion of the contract.

On December 2[illegible], 1913 replication was filed to the amended answer by appellee and afterwards the cause was referred to the master in chancery to take the proofs and report the same and his conclusions. The master subsequently made his report to the court, to which both complainants and defendant filed exceptions and by stipulation of the parties it was agreed that the conclusions of the master should be disregarded and the cause tried by the court upon the proof taken before the master without regard to his conclusions. The court in its decree found that the contract of March 23, 1911 and two supplemental contracts, one dated July 17 and the other October 2, 1911, entered into between the parties and relating to the work to be done under the original contract, were entered into and fully performed; that the total value of the work and material furnished in the construction of the railroad trestle, incline, pile dike and drift fender, was $103,442.38 and that the amount of money paid by appellant on account of said work was $87,544.23; that appellant was entitled to a further credit for engine services, coal and engine supplies of $476.87; that appellant was also entitled to its claim of $1421.17 for work done and materials furnished by appellants to said contractors, composing appellants counterclaim No.2 above referred to, except $427.70, which had been charged by appellants on account of expenses, transportation, wages and material needed to complete what was known as the Kellogg incline which was dis-

contractor in the completion of the contract.

On December 2nd, 1913 confirmation was filed to the amended answer by appellee and a termsrate the cause was referred to the master in chancery to hear the proofs and report the same and his conclusions. The master subsequently made his report to the court, to which both complainant and defendant filed exceptions and by stipulation of the parties it was agreed that the conclusions of the master should be disregarded and the cause tried by the court upon the proof then before the master without regard to his conclusions. The court in its decree found that the contract of March 22, 1911 and two supplemental contracts, one dated July 17 and the other October 2, 1911, entered into between the parties and relating to the work to be done under the original contract, were entered into and fully performed; that the total value of the work and material furnished in the construction of the railroad tracks, including, pile dike and drift tender, was $102,442.38 and that the amount of money paid by appellant on account of said work was $87,944.20; that appellant was entitled to a further credit for engine service, coal and engine supplies of $477.87; that appellant was also entitled to its claim of $14,011.17 for work done and materials furnished by appellant to said contractors, concerning appellants counterclaim No. 5 above referred to, Record (427.7), which had been charged by appellants on account of expenses, transportation, water and material needed to complete what was known as the Hilltop Section which differed

allowed, leaving the sum of $993.47 as the balance of this counterclaim for which appellant was entitled to take credit. The court in its decree rejected the claim of appellant of $10,758.44 for work done by it to protect the trestle and incline above referred to, as its first counterclaim and also the claim of $5500 damages on account of delay in the completion of said work above referred to as appellant's third counterclaim, for damages, and found the balance due contractors to be $14,427.81, with interest at the rate of five per cent per annum from the 29th day of October, 1919, amounting to $1837.54, making a total of $16,265.35 for which amount a decree was entered in favor of appellees and made a lien upon its property as asked for in the petition.

The answer of appellant pleaded a defect of parties, insisting that W. H. Swift, who was a member of the firm when the contract was signed, should have been made a party to this suit and prayed that the cause should not proceed until said W. H. Swift was made a party thereto. The trial court refused to make such order and the first question presented by appellant on this appeal is whether that court erred in refusing to dismiss the bill. It appeared from the proofs that at the time the contract was entered into W. H. Swift had one-tenth interest in the partnership but was not actively engaged in carrying on its business and that before the completion of the contract, he retired from the firm, relinquishing all his interest therein and in the said contract. Appellee sued as successors to the ori-

ginal contracting firm as shown on the face of their petition. The contract provided that the contracting company should not assign or transfer the contract or sublet any part of it without the consent of the engineer in charge but the retirement of William H. Swift from the contract, does not appear to us to have been an assignment or a transferring or subletting of the contract as contemplated by this provision thereof. The objection raised is a technical one at best and as William H. Swift had no interest whatever in the money sought to be recovered in the action and as the failure to make him a party did not affect the interests of appellant, or the trial of the suit in any way, we do not think the failure to make him a nominal plaintiff was a substantial error calling for the reversal of the decree.

Appellant complains the court should have allowed all three of the counterclaims or set offs, and in support of such contention relies on the final report of the engineer in charge of the work, which it insists by force of provision 7 of the contract heretofore quoted, was final and not subject to review by the court. This report found the total amount of work and labor furnished, was $103,442.38, the totalpayments made $87,544.23, that appellant was entitled to the credit of $476.87 as allowed by the court in its decree and also the following items: (1) Labor etc., on Kellogg incline in July and August, 1912, $773.37. (2) Piling driven in fender dike April 1912, $3444.48. (3) Piling washed out and not recovered, $2193.74, making a total of credits to be deducted in addition to the payments above

made of $6,888.46 which he deducted from $103,442.38 leaving $96,553.92. He then deducted the payments above referred to, amounting to $87,544.23, leaving a balance of $9,009.69 and found that such balance was due appellees unless there was counterclaims. He also suggested that appellant might have a claim for damages in consequence of the delay in the completion of the work caused by the failure on the part of the contractor to proceed at the rate specified in the contract; also that under a proper construction of the contract, the appellant might be entitled to recover from the contractor the cost of labor and material furnished by it to protect the work and prevent thewashing out of the southern part of the incline.

While under section 7 of the contract the estimates and decisions of the engineer were made final and conclusive, yet this provision was made in said section to refer to the determination of the amount or quality of the several kinds of work which were to be paid for under the contract and to all questions which might arise relative to the execution of the contract on the part of the contractor, and was not intended to apply in a case where it was apparent he had made a mistake in his figures or final calculations. We are of opinion that the items for labor etc. on the Kellogg incline for July and August, 1912 for which the engineer allowed appellant a credit of $777.37, should have been allowed by the court if it was not included in the credit of $993.47 given appellant in the decree; also that

the item of $3,444.48 allowed appellant by the engineer for piling driven in the fender dike in April, 1912, should also have been allowed by the court, as this was necessary for the completion of the contract. We are further of opinion, however, that the credit of $2,193.74 allowed appellant by the engineer for piling washed out of the fender dike in April 1912 and not recovered was not a proper charge against appellees, as it would seem that appellant had been paid in the item of $3,444.48 for restoring the piling. If appellant was paid for restoring the piling it is apparent it was not entitled to pay for what washed away.

We conclude that the credits or counterclaims which appellant sought to have allowed, other than those above mentioned, were properly rejected by the court, but on account of the failure of the court to give appellant the credits to which he was entitled as above set forth, the decree will be reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

Not to be reported in full.

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against appellee, as it would seem that appellant had been

paid in the item of $3,444.40 for restoring the piling. If

time in April 1912 and not recovered was not a proper charge

pellant by the engineer for piling washed out of the tender

option, however, that the credit of $1,152.72 allowed ap-

for the completion of the contract. We are further of

also have been allowed by the court, as this was necessary

for piling driven in the tender dike in April, 1912, should

the item of $3,444.40 allowed appellant by the engineer

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th day of April A. D. 1916.

Clerk of the Appellate Court.

NION

2337

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

202 I.A. 542

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

August Eggert, Jr., et al,

Plaintiffs in Error.

vs.

No. 6

March Term, 1916.

Stephen D. Sexton, Trustee,

Defendant in Error.

ERROR TO ~~APPEAL FROM~~

City COURT

East St. Louis ~~COUNTY~~ COUNTY

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN

Term No. 6. March Term, 1916. Agenda No. 1.

August Eggert, Jr., and Charles L. Hurst, Plaintiffs in Error	Error to City Court of East St. Louis.
v.	
Stephen D. Sexton, Trustee, Defendant in Error.	

Opinion by Higbee, P. J.

---oOo---

Plaintiffs in error, by writ of error to the City court of East St. Louis, have brought to this court the record in a foreclosure proceeding against certain real estate, which resulted in a decree in favor of defendant in error, and the questions presented for our consideration arise out of the following facts:

On January 12, 1911, August Eggert, Jr. executed and delivered to Stephen D. Sexton, trustee and defendant in error, twelve promissory notes of that date, payable to said trustee at the office of Sexton and Company, Sexton Building, in the city of East St. Louis, Illinois, four for the sum of $500 each, and two for $1000 each due and payable in three years from date and the other six for the sum of $1000 each due in four years, making a total amount of $10,000. Each of said notes provided for interest thereon at the rate of six per cent per annum, payable semi annually on the 12th day of January and July of each year, "on the

Term No. 6. Batch Term, 1910. Agenda No. 1.

Robert Sargent, Jr., and Charles S. Hurst,

Plaintiffs in error,

v.

Theodore D. Bacon, Trustee,

Defendant in error.

Error to City Court of East St. Louis.

Opinion by Higbee, J. .

Plaintiffs in error, by writ of error to the City Court of East St. Louis, seek a reversal of the judgment in a interlocutory proceeding granting relief by injunction, which resulted in a decree in favor of defendant in error, and the questions presented for our consideration arise out of the following facts:

On January 10, 1911, Robert Sargent, Jr. executed and delivered to Theodore D. Bacon, trustee and defendant in error, twelve promissory notes of that date, payable to said trustee at the office of Bacon and Company, Bacon Building, in the city of East St. Louis, Illinois, for the sum of $500 each, and two for $1000 each and payable in three years from date and the other six for the sum of $1000 each due in five years, making a total amount of $11,000. Each of said notes provided for interest thereon at the rate of six per cent per annum, payable semi-annually on the 10th day of January and July of each year. To the

presentation and surrender of the respective coupons hereto annexed at the said office of Sexton and Company." To secure these notes Eggert gave a mortgage on the property foreclosed to said trustee. This mortgage provided, among other things that all taxes and assessments should be fully paid by said Eggert, and that Eggert should keep the improvements on the mortgaged premises insured "to the same amount and by the same kind of insurance now in force upon said property" and that all of said insurance to the amount of the mortgage debt, should be payable to and collected by said trustee and his successors or the holder of said notes; that in the event said Eggert should neglect to pay the taxes or assessments on said premises at least ten days before the day such premises might be sold for non payment of the same, or should neglect to pay all the insurance on said premises when due and payable, that said trustee might pay the same and such taxes and insurance should become so much additional indebtedness secured by said mortgage; that in case of a default in the payment of said notes or any coupons for ten days or in the event that said premises were permitted to be sold for taxes or assessments or there was a failure to keep up said insurance, that then at the option of the legal holder of said notes and coupons, all of said principal and interest together with all taxes, assessments and insurance paid by the mortgagee, by the terms of the mortgage, might become due and collectable by suit at law or by the foreclosure of said mortgage. Subsequently and prior to the

bringing of this suit Eggert sold the property included in said mortgage to Charles N. Hurst, one of the plaintiffs in error. In January, 1915, the trustee filed a bill to foreclose the mortgage, alleging default in the payment of principal and interest, a failure to keep up the insurance and that the premises had been permitted to be sold for taxes. Hurst was not made a party defendant to the suit, but afterwards came in and filed an answer, stating that on June 1, 1913, he had purchased the real estate mentioned in the bill, from August Eggert, subject to the mortgage indebtedness above referred to; that he received a warranty deed therefor, which was duly filed for record on June 3, 1913, in the office of the recorder of the proper county; that after acquiring said deed, he employed said Sexton, trustee, to act as his agent and collect the rents accruing from said premises and that said trustee accepted said employment and has since then collected the rents for said Hurst; that he had paid all interest due on the notes and that the next payment of interest would have been due on January 12, 1915, but only upon condition of presentation and surrender by said trustee to said Hurst of the coupons and notes representing the amount then due; that said Hurst has always been ready and willing to pay any of said notes and the coupon interest thereon if presented and surrendered to him by complainant, and is now able and willing to pay any amount the court might decree to be due and payable; that "said $4000 was due January 12, 1914, that sometime in the spring of 1914 before default in payment thereof, said

Hurst went to Sexton and Company, office of complainant, to pay said $4000, and parties in charge thereof said they did not have the note; that other persons had them, that they collected for them and would not tell who had said notes or where the same were"; that the trustee knew, before the filing of the bill, that said Hurst had purchased the property and was and still is the owner of the same; that if it is true that said trustee paid the taxes and insurance on said property, as by him alleged, he did so with the rent money collected by him from the tenants on said premises as agent of said Hurst.

The case was referred to the master in chancery, who made a report, finding that all the material allegations of the bill of complaint had been proven, stated the account, and recommended that a decree be entered as prayed for. Later the master filed an amended report somewhat fuller than the first and restated the account. By this report he found there was due to Stephen F. Sexton, trustee, who owned the notes, the whole of the principal, amounting to $10,000, interest thereon to March 24, 1915, in the sum of $728.34 also $110.83 expendedfor insurance and $5. for extension of certificate of title, making a total of $10,844.17. The master also found from evidence produced before him, that the sum of $650 was the usual, customary and a reasonable solicitors fee for services rendered, and this amount was added to the total above named. Objections to the master's report were overruled by him and renewed as exceptions in the court upon the incoming of the report. The court overruled the exceptions to the master's

report and entered a decree of foreclosure in harmony with the master's finding. A sale was ordered and a receiver of the property appointed. In pursuance of the decree, a sale of the property took place, which was afterwards set aside and vacated by the court for the reason that the master did not give notice thereof in the manner provided by law and by the decree ordering the sale and a resale was ordered.

It appears that the whole of the principal debt secured by the mortgage in this case, together with the interest thereon for a year, was due and unpaid at the time of the filing of the bill, but plaintiff in error Hurst, claims that the bill was prematurely filed, because he was entitled to have the notes and coupons attached thereto, presented to him at a certain place; that he went to the place agreed upon in the notes and coupons and offered to pay the same, but that they were not there and he was unable to obtain them and he further alleges that he has always been ready and willing to pay the notes and interest coupons due thereon, if presented and surrendered to him at the place named and is now able and willing to pay any amount the court may decree to be due and payable. The mortgage notes and interest were produced on the trial and must sometime be paid by plaintiffs in error if a foreclosure is to be averted. Hurst insists, however, that it cannot be done in this suit and that he must be permitted the opportunity of paying the debt without paying the costs of ~~the~~ suit. It was provided in the notes that principal and

interest should be payable upon the presentation and surrender thereof. The notes in this case were made payable at the office of Sexton and Company, Sexton Building, in the city of East St. Louis and the interest coupons were payable on presentation and surrender thereof, at said office. Section No. 70 of our Negotiable Instrument Act, provides "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument, except in case of bank notes but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment on his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers". Section 74 of the same act states "The instrument must be exhibited to the person from whom payment is demanded and when it is paid must be delivered up to the party paying it." Mr. Hurst had paid all the interest due up to January 1st, 1914, and when he paid interest he received either a receipt or interest coupon. In case he received a receipt, the couponwas subsequently mailed him. When he went to the office of Sexton and Company on March 3, 1914, the coupons were not in the possession of Mr. Sexton and he got a receipt for the interest paid. He testified that he always protested against accepting receipts and asked for the original notes; that the last time he went there he asked for the coupons before he paid any money but "they said they did not have them". Upon

this subject Mr. Sexton testified that Hurst asked for the coupons but that they were not in; that he did not tell him where they were because he did not tell any body about them; that they had been sold and that he had to get them from the persons who owned them. Counsel for defendants in error insist that it was not necessary for the trustee to produce the coupons when demanded to do so by the debtor, but we are inclined to the opinion that by the language of the notes and under the Negotiable Instrument Act, the debtor had a right to require that the coupons should be produced to him before he made payment. Defendant in error Hurst, claims that he has always been ready and willing to pay any of said notes and the interest coupons thereon, if presented and surrendered and is now able and willing to pay any amount due. Counsel for plaintiffs in error state in their brief, that when Hurst went to pay the amount due a day or so before this suit was brought, he demanded that note and coupon be surrendered to him upon payment and was told that he could not have them and "that they would not tell him where they were."

The record in this case is not wholly satisfactory as to what took place in regard to the payment of interest, but we are unable to discover from Mr. Hurst's testimony or elsewhere that he made any attempt to pay either principal or interest after March 14, 1914, which was the date of the last receipt offered by him in evidence. It does not appear that he presented himself at the office of Sexton and Company, after the notes were all due and offered

to pay the same and the interest thereon, upon the production and delivery to him of the papers. He therefore did not bring himself within the requirements of the instruments in question or of the statute, to entitle him to the possession of such instruments, and consequently defendant in error had the right, after the maturity of all the indebtedness, to bring his suit for the foreclosure of the mortgage, as he did. Some question is raised by plaintiffs in error, as to the correctness of the master's statement in regard to the amount due to defendant in error for taxes and insurance paid by him under the mortgage. Their claim is based upon the statement of Mr. Hurst that he had employed the firm of Kenton and Company to collect rents on the property in question and authorized them to pay taxes and insurance out of the funds collected by them and that they had received sufficient rent to pay this indebtedness. It appears from the proofs however, that Mr. Ben T. Kenton, the trustee was not a member of the firm of Kenton and Company and therefore whatever dealings Mr. Hurst may have had with that company, concerns only him and them and not the trustee. The amount allowed, however, by the master, for taxes and insurance paid by the trustee, seems to be fully warranted by the proofs. Upon careful consideration of this record we have arrived at the conclusion that the master's statement of account was correct, that the suit was not prematurely brought and that the decree of the court below should be affirmed.

Decree affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.

C. C. Johnson

Clerk of the Appellate Court.

NION

2335

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 544

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John T. Hayden, Executor etc.,

Appellee.

vs.

No. 11.

March Term, 1916.

Benjamin J. Hargan, Guardian, etc.,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Pulaski COUNTY

TRIAL JUDGE

HON. BENJAMIN W. POPE.

Term No. 11. March Term, 1916. Agenda No.4

John T. Hayden, Executor etc., Appellee. v. Benjamin J. Hargan, Guardian, etc., Appellant.	Appeal from Pulaski.

Opinion by Higbee, P. J.

---oOo---

W. T. Hayden, of Pulaski county, Illinois, died leaving a last will and testament, which was duly admitted to probate in said county. Appellee, John T. Hayden was named as executor in the will and duly qualified as such. At the time of making the will the testator had seven living children. Prior to his death a daughter Ida M. Hargen had died leaving four minor children and of these Benjamin J. Hargen, appellant, was appointed guardian by the county court of said county. The testator owned several tracts of land and in making his will he gave to some of his devisees land and others money, and in order that all except one, who was afflicted, should share equally, he valued each tract of land and provided for payments of money to be made in such a way as to accomplish his object. That the plan adopted may be fully understood, we think it best to set out this portion of the will which is as follows:

"I bequeath to George W. Hayden the north half of the northeast quarter of the southeast quarter of section 12,

township 16, range 1 west, at valuation of one thousand dollars, as per bond and cash to make an equal share. I bequeath to Mary L. Roulette the east half of the southwest quarter of section 13, township 16, range 1 west, at a valuation of two thousand dollars. I bequeath to W. T. Hayden an equal share in cash. I bequeath to John T. Hayden an equal share in cash. I bequeath to Mariah C. Manuara the north half of the southwest quarter of section 7, township 16, range 1 east, at a valuation of twenty five hundred dollars, as per bond. I bequeath to Romantha A. Hayden the home place, consisting of thirty acres, in section 7, township 16, range 1 east. On this I put no valuation, as she is unable to make a living, being a cute, and I recommend her brother, T. J. Hayden, as her guardian. I bequeath to the heirs of Ida M. Hargen, deceased, being Ival Hargan, Needa Hargan, Verna Hargan and Zelma Hargan, the west half of the southeast quarter of section 13, township 16, range 1 west, at a valuation of sixteen hundred dollars, as per bond. I bequeath to Samuel J. Hayden thirty acres in section 12, township 16, range 1 west, as per bond, at a valuation of sixteen hundred dollars, also eighty acres, being the east half of the south east quarter of section 13, township 16, range 1 west, at a valuation of thirteen hundred dollars as per bond. Now, this land is all described from the third principal meridian, Pulaski county, Ill. Now, as the above disposes of all the real estate until the demise of my wife, Amaline Hayden, then the house and lot in Mound City will have to be sold and a division made. Now, it is my earnest

desire that my estate shall be settled as above, each sharing equally, except Romantha A.. Those that has more than their share in land must pay over the balance so all may have an equal share, and indebtedness to the estate by any of the heirs by note or otherwise shall be counted against them as cash."

The testator's widow, Emaline Hayden, renounced her rights under the will and filed a suit in the circuit court of said county, claiming dower and homestead interest in the estate of the testator and sought to have declared void and of no effect a certain anti-nuptial agreement entered into between her and said testator, prior to their intermarriage. Later she settled her claims against the estate with the executor for the sum of $1150 and the right to use the homestead during her life and this settlement was ratified and indorsed by the county court. The executor then made a settlement showing the condition of the estate by which it appeared that by equalizing the devises and bequests, each child except Romantha A., would be entitled to $1429.42 counting the four minor children of Ida I. Hargan, deceased, as being entitled to one share of that amount. The land conveyed to the Hargan children was valued by the testator at $1600 and in order to pay this difference and equalize all obligations, the executor determined that they should pay to the estate the sum of $300.73. This sum not being paid into the estate, appellee, as executor, filed a petition against appellant as guardian of the four minor Hargan children above named in the county court, asking that

the ~~county~~ court ascertain the amount necessary to be paid over by the ~~Hangan~~ minors to the executor, to equalize the devise to them in accordance with the terms of said will, and that upon said amount being ascertained and determined, that said guardian be required to pay to said executor the amount so fixed out of whatever fund should be in his hands as guardian, belonging to said minors and that in case said guardian did not have sufficient funds with which to pay said amount, that then he be directed to file his petition in said court for leave to mortgage his wards' real estate, for a sufficient amount to pay the same.

Appellant filed an answer denying the authority and jurisdiction of the court to consider the matter and also setting up as a defense, that under theproper construction of the terms of the will each of said four minor children was entitled to $1600 and therefore they did not owe the estate anything, but on the contrary the estate was indebted to them. Upon the hearing the county court sustained the petition and ordered that the guardian pay said sum of $300.73 to the executor. An appeal was taken from this order to the circuit court, which also found in favor of the executor but found that the exact amount to be paid over by said guardian, had not been determined by the county court and it was therefore ordered that said guardian apply in a proper proceeding to ascertain the amount necessary to be paid over to said executor, in order that the land devised to his wards might be relieved of the lien or charge of any excess which they may have received over and above their

equal share in said estate, if any such should be found to exist; that upon said amount being so ascertained, said guardian should pay the same to said executor, out of any funds belonging to said wards in his hands, within thirty days and in case he had not sufficient funds to pay said amount, that he should immediately apply to the county court by a proper petition for leave to sell or mortgage personal property or real estate sufficient to satisfy said amount. From the order of the circuit court an appeal was taken to this court by the guardian of said minors. There was a motion filed in this case to strike the record and also the bill of exceptions from the files. As to the record the fault suggested was cured by the filing of a supplemental record by leave of court. The point raised against the bill of exceptions was that the order granting the appeal, provided that it should be filed within sixty days but that it was not filed within that time. The order of the circuit court was made on June 16, and the amended record shows that the bill of exceptions was signed by the trial judge on August 16 following and that an order was made by the judge, directing the clerk of the circuit court to file the bill of exceptions nunc pro tunc, as of August 16, 1915. The bill of exceptions was therefore filed on the sixty-first day, but it appears that the sixtieth day was Sunday and it was therefore sufficient to comply with the rule that it be filed on the following day. It is provided by clause 11 of section 1, chap. 131, of our Jta 11102 Revised Statutes that, "The time within which any act pro-

vided by law is to be done, shall be computed by excluding the first day and including the last, unless the last day is Sunday, and then it also shall be excluded." In pursuance of this statute, our supreme court held that when the last day of the period fixed by the trial court for filing an appeal bond, fell on Sunday, the bond filed the following day was in apt time. People v. Scanlan, 205 Ill.6 9. The motion of appellant was therefore not well founded and cannot be sustained.

Appellant contends here as he did below, that the circuit court erred in holding that his wards took under the will, per stirpes and not per capita. It is well not to lose sight of the fact that by the will, the land and not money was willed to these children and be the rule whatever it may, the land is all that the four children were devised and entitled to get and the only question which can arise is as to whether it was the interest of each child or the interest of all that was to be valued at $160. If appellant's contention is correct, then the value of the four interests would be $640 and the four minors would have to pay into the estate a very large sum to equalize their interest with that of the others, which would of course render the devise to them worse than useless. It is plain, however, that the testator intended only to value the whole tract devised to the minors at $160 and it is further evident from the reading of the whole instrument that the testator also intended that they should take per stirpes and not per capita. The next question is whether the probate court had such

equitable jurisdiction in the case as permitted it to fully settle the estate and whether the appeal carried such equitable powers with it. The matters involved and sought to be adjusted, were all related to the estate of . T. Hayden, deceased, which was in the court of settlement. The law seems to be well established by the courts of this state that its probate courts and the circuit courts on appeal, in probate matters, have the right to exercise equitable jurisdiction in the settlement of estates when necessary to further the ends of justice and that it is only in extraordinary cases that courts of equity will supersede the probate court in making such settlements. Wadsworth v. Connell 104 Ill. 369; Shepard v. Spear, 140 Ill. 36. The adjustment of those matters necessary to be done to equalize the interest of the Morgan minors with the other devisees, under the Hayden will, could easily and properly be done by the county court in the exercise of its probate jurisdiction. As the amount to be paid was first to be determined in the settlement of the affairs of the estate, there was no way by which the powers of a court of law could be invoked to determine the matter. It is probable that the amount to be paid by the minors could be ascertained and an adjustment of the rights of the parties made in a court of equity, but these things could be more easily done in probate, and we see no good reason why a court of equity should necessarily be called upon to supersede the county court in making such adjustment. We conclude that the county court, under the equity powers given it by statute, could grant the relief sought for in the petition filed by appellee, and that the circuit court on appeal, had the same power and the judgment appealed from in this case will therefore be affirmed.

Judgment affirmed.

Not to be reported in full. -7-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th day of November, A. D. 1916.

C. C. Johnson

Clerk of the Appellate Court.

NOIN

2336

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 546

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

People of the State of Illinois,
Defendant in Error

vs.

No. 17
March Term, 1916.

Bob Belina,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

County COURT

Franklin COUNTY

TRIAL JUDGE

HON. NEALY I. GLENN

Term No. 17. March term, 1916. Agenda No. 7

People of the State of Illinois, Defendant in Error.	
v.	Error to County Court
Bob Belina, Plaintiff in Error.	of Franklin.

Opinion by Higbee, P. J.

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Bob Belina, plaintiff in error was prosecuted in the county court of Franklin County, Illinois, for selling intoxicating liquors in the town of Tyrone, in said county, which was at the time being, anti-saloon territory. There were 14 counts in the information, and the jury returned a verdict of guilty on each count. It appeared the fourteenth count was defective and a motion in arrest of judgment was sustained to it, judgment being entered in accordance with the verdict on the other thirteen counts. The court sentenced Belina to pay a fine of $20 on each of the thirteen counts and to serve ten days in jail on each of the first six counts. Belina has brought the case here by writ of error, seeking to reverse the judgment on account of errors alleged to have been committed by the court in entering judgment, in admitting improper evidence and in instructing the jury, and also on the ground that the evidence was insufficient to sustain the verdict. Counsel in-

sist that judgment could not be legally entered on the thirteen counts after it had been arrested on one count, for the reason that the verdict, although finding the defendant guilty on the several different counts, "is so far a unit that it must stand or fall together", and relyy upon the case of the People v. Gaul 232 Ill. 67 as being decisive of that question. We find, however, that the case referred to only holds that the judgment of the county court in a prosecution, under the dram shop act, although based on different counts of an information, is a unit and must be reversed in whole or affirmed in whole in the appellate court, and does not go to the extent of holding that the verdict of the jury is a unit to the same extent. While the judgment in this case was a unit, notwithstanding it was based on a verdict of guilty on thirteen different counts of the information, yet that rule did not affect the rights of the court below before judgment was entered to arrest it as to any one or more of the counts after verdict.

At the trial notice was served on Selina to produce a special revenue stamp, claimed to have been issued to him by the Federal government and upon his failure to produce the same proof was offered in reference thereto. It appears from the record that a witness was introduced who testified that he had examined the records in the office of the collector of internal revenue for the proper district, to ascertain whether any internal revenue stamp had been issued to Selina for the year 1914; that he found it had and that he had made an examined copy of the same, the contents of

which he proceeded to state. An objection was made by counsel for the defendant for the reason that the examined copy would be the best evidence, but the court appears to have permitted the contents of the examined copy to be read. The examined copy was then offered in evidence, but counsel for plaintiff in error thereupon said "We object to that because he has had it testified to as to the contents of it so that would be encumbering the record and would be duplicating the evidence." Plaintiff in error contends that while the law is that the issuance of the special tax stamp is prima facie evidence of the sale of intoxicating liquors in anti saloon territory, yet it provides how such fact must be proved which is by the original stamp itself, or an examined copy of the records of the district where the same is issued. The position of plaintiff in error as to the manner in which proof of the issuance of the special tax stamp should be made, is correct. People v. Joyce 154 Ill. App. 13. People v. Baum 159 Ill. App. 315. But in this case the people offered to introduce an examined copy of the record, showing an issuance of the special tax stamp, and it was excluded by the court on the motion of counsel for plaintiff in error, because its contents had already been testified to. Under these conditions plaintiff in error cannot be permitted to maintain his insistence here that the court erred in not requiring proof of the issuing of the stamp tax by an examined copy of the record thereof.

While defendant in error's instructions were not

all carefully drawn and are rightfully subject to some criticism, yet we have found no such error in them as would justify this court in reversing the judgment on account thereof. The jury were instructed on the theory that the sales of liquor to warrant a conviction, must have taken place prior to February 2, 1915, and if, as suggested by plaintiff in error, any sales were testified to that might have been made after that time, any prejudice to plaintiff in error was obviated by the instructions, and in any event there was ample proof in the record to sustain convictions under the counts on which judgment was entered. We find no error in this case of sufficient importance to warrant a reversal and the judgment of the court below will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 22nd day of November, A. D. 1916.

Clerk of the Appellate Court.

NION

2337

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

202 I.A. 548

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Emil Sanboeuf,

Appellee

vs.

No. 23

March Term, 1916.

Murphy Construction Company,

Appellant

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. W. M. VANDEVENTER

Term No. 23. March Term, 1916. Agenda No.34

Emil Sanbocuf,
Appellee

v.

Murphy Construction Company,
Appellant.

Appeal from City Court of East St. Louis.

Opinion by Higbee, P. J.

----oOo----

On June 8, 1915, appellant was building a round house in St. Clair county, Illinois and in its construction was using large quantities of concrete. This was mixed and carried to a high tower, from whence it was conveyed by chutes to such places about the building as moulds were ready to receive it. Appellee was in the employ of appellant in the construction of the work, it being his duty to help keep the concrete moving through the chutes. On this day the section of the chute where he was working, was twelve feet long, the bottom twelve inches wide and the sides seven inches high, and it was constructed of one inch boards. It was eleven feet high at the upper end and seven feet at the lower end and at the side of the chute, there was a ledger or scaffold on which appellee and the others could stand and pull the concrete on down when it clogged in the chute. For the purpose of keeping the concrete moving hoes were used by the workmen.

It was shown that appellee was ordered not to get

into the chute to pull down the concrete but he and others did get into it on other occasions, and this in the presence of those under whom they were working. On the date above named the concrete clogged and appellee and another workman got into the chute to pull it down. Their weight and that of the concrete made the chute sag in the middle, which caused a large quantity of concrete to stop at that point. Appellee felt the chute going and stepped out of it on to the ledger. In a very short time the chute gave way, knocking the ledger down and throwing appellee to the ground. His wrist was sprained and there was a cut on his leg several inches long, extending from just below the knee. He brought suit for the injuries so received against the Construction Company, the declaration containing two counts. The first count alleged the chute was not of sufficient strength or of such construction as to sustain the weight that was necessarily put upon the same; that in the performance of his duties, appellee was required to get into the same in accelerating the movement of the concrete and becoming aware that the chute and frame work supporting it, were not sufficient to support the weight in the use made of it, got out of the same onto the ledger when it fell knocking down the ledger and causing his injury. The second count averred the insufficiency of the chute and the frame work supporting the same, and that appellee in the performance of his work, was required to get into the chute and that the same was a dangerous and unsafe place to work. It was also alleged that appel

lant had filed with the Industrial Board of Illinoi , its election not to provide and pay compensation, according to the provisions of the Workmens Compensation Act of this state. The trial resulted in a verdict and judgment in favor of appellee Emil Sanbouef for $1400, from which the construction company appealed.

Appellant complains that the declaration was insufficient to support the judgment, in that it did not allege any duty onthe part of appellant towards appellee. In McAndrews v. C.I.& S.R. Ry. Co. 282 Ill.238, relied on by appellant, it is stated in a personal injury case, "In actions of the character of this it is necessary to aver and prove three elements to make out a cause of action: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure.... and it is not sufficient in the declaration to allege that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion, but the declaration must state facts from which the law will raise the duty." Also, "The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect." That case also quotes from Mackey v. Northern Milling Company, 210 Ill.115, where it is said, "It is well established rule that a declaration,

in cases of this character, must state facts from which the law raises a duty from the master to the servant, and if the declaration fails in this regard then it is insufficient to support a judgment. As stated in Ayers v. City of Chicago, 111 Ill.406, 'the pleader must state facts from which the law will raise the duty.'" From this we conclude that in drawing a declaration charging negligence, it is not necessary, even if it is proper to allege alone a duty on the part of the defendant to do certain things, but that facts must be alleged from which the law will raise a presumption of such duty. In the present case it is stated that appellee was employed by appellant, that the chute was dangerous and unsafe, and that employes were required to work in the same, that the chute would frequently get clogged so that employes would have to get in it to accelerate the concrete; that such condition was known or could have been known to appellant by the exercise of proper diligence; that while appellee was in the chute moving the concrete, it gave way by reason of its unsafe condition. We think this statement was sufficient to show an obligation on the part of appellant to make the chute in which it was necessary for him at times to work, safe, that is to furnish him a safe place to work; that the existence of these facts show the legal existence of such obligation. The duty to exercise reasonable care to see that the place furnished for a servant to work is reasonably safe is a positive obligation towards the servant and the master is responsible for any failure to discharge that duty, whether

he undertakes its performance personally or through another servant. Hess v. Rosentahl 160 Ill.621. The declaration, therefore, was not subject to the fault complained of and was sufficient to support the judgment.

Appellant further contends that the court should have directed a verdict for the defendant on its motion and that the verdict is contrary to the evidence. It is the position of appellant that the rule requiring the master to furnish his employes a safe place in which to work, does not apply in this case, because it does not extend to buildings in process of construction. While such a rule exists, we do not find it applicable to the facts in this case as shown by the proofs. In McCain Co. v. Kingsbury, 126 Ill. App.165, where the question is raised, the court in recognizing the rule, adopts a portion of the opinion in Richardson v. Anglo-American P. Co. 72 Ill.App.77, where Justice Sears, in delivering the opinion, says, "The doctrine contended for by counsel for appellant is settled beyond possible question as applied to machinery, structures or places provided by the employer for the use of his employes. But the rule cannot, we think, be reasonably extended to cover portions of an incomplete building in process of construction. That it does apply to scaffolding, furnished by the employer for brief use only, is true; and the rule is often announced as covering 'surroundings', viz.: the master is obligated to provide reasonably safe surroundings; but it does not seem logical or just to give to the term an interpretation broad enough to cover portions of the build-

ing itself while in the course of construction, and while undergoing constant changes and passing through successive temporary conditions, many of which must, from the very necessity of construction, be dangerous." It would appear that under the facts, this case would not come within the exception above named, but even if it would, the doctrine could not be taken advantage of here as by its failure to come under the provisions of the compensation act appellant cannot take advantage of the doctrine of assumed risk and contributory negligence. The facts in this case appear to show negligence on the part of appellant, and the trial court did not err in refusing to direct a verdict in its favor. The proof was also sufficient upon the whole case to fully justify the verdict in favor of appellee.

Appellee insists with considerable force that the doctrine of res ipsa loquitur applies in this case, for the reason that the very happening of the events which caused the injury would show an improper construction of the chutes and ledger, for the protection of employes, but whether that doctrine applies or not, the facts were sufficient to sustain appellee's case. Appellant further complains that the court erred in refusing to give four special interrogatories, requested by it, to be given to the jury. The first of these interrogatories is as follows: "Was the work upon which defendant was engaged at the time of plaintiff's alleged injury, a work of construction of a building or other structure, which was undergoing changes and passing successive temporary conditions which, from the very nature of construc-

tion were dangerous" and the second was along the same line of inquiry. From what is above said, it would appear that these interrogatories do not, under the facts in this case, present questions which could properly effect the rights of appellee to recover. Special interrogatories three and four, called upon the jury to answer questions as to evidenciary facts only and not as to ultimate facts in the case, which would effect the verdict. The special interrogatories were therefore properly refused by the court.

Appellant also complains of the refusal of a number of its instructions. Several of the refused instructions related to the question whether or not appellee was guilty of negligence on his part, and were properly refused under the provisions of the Compensation Act. Others referred to questions as to whether it was the duty of appellant to furnish appellee a safe place to work under the changing conditions attending the construction of the building, and were not in accord with our views as above expressed. Several general instructions offered for appellant stated abstract propositions of law, which were not wholly free from criticism, and which being abstract, it was not error for the court to refuse to give. Appellant further contends that the verdict was so excessive as to show passion and prejudice on the part of the jury. The injuries of appellee do not seem to be very severe but the verdict is only for $400 and while it would appear to be sufficient in amount, it is not so excessive as to warrant a reversal of the judgment on that account. The judgment of the court below in this case will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd *day of November, A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

NION

2338

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 550

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ferdinand W. Fries, et al.,

Defendants in Error

vs.

No. 24

March Term, 1916.

Malbern M. Stephens and Chas. L. Gray,

Plaintiffs in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

St.Clair COUNTY

TRIAL JUDGE

HON. WM. B. WRIGHT

Term No. 24. March Term, 1916. Agenda No.31

Ferdinand W. Fries, et al,
Defendants in Error.

vs.

Error to St. Clair

Malbern T. Stephens and Charles T. Gray,
Plaintiffs in error.

Opinion by Lighb[illegible], P. J.

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In the fall of 1911 the Marlborough Building and Realty Company, a corporation, owned a ninety nine year lease on the north west corner of Eighth and Locust streets in St. Louis, Mo. and a large office building thereon, called the Victoria. There was a first mortgage on the property to secure a bond issue of $300,000 and also a second mortgage to secure serial notes amounting to $225,[illegible]. Foreclosure proceedings had been commenced on the second mortgage and interest was due on the first mortgage. The corporation also failed to pay the ground rental and taxes when due and for two years had failed to pay the amount which it was provided in the first mortgage should be paid into the sinking fund, so that for all purposes it required that about $49,000 should be paid to avoid the foreclosure of the first mortgage. Under these conditions plaintiff in error Stephens, who was president of the corporation, called a meeting of the holders of the serial notes to devise some way to save the property. Thirteen banks, trust companies

and individuals, whose separate holdings amounted to about $70,000 of the notes, were represented at the meeting. Among these were the defendants in error, who were doing business as the bank of New Athens and will hereafter be called "the bank," who held $5000 of the serial notes. It was finally arranged that the holders of the serial notes would buy in the property at the foreclosure sale, under the second mortgage, clear up the outstanding claims and deed the property to defendants in error or to a person or persons designated by them, free of all indebtedness, but the mortgage for $308,000. The holders of the serial note were to receive new notes for the amount due them by a new second mortgage on the property, for $100,000 with the further agreement that at the end of two years plaintiffs in error would purchase said new notes so issued if presented by the respective parties, for that purpose. A committee was appointed by the note holders at the meeting, to enter into such an agreement and the contract was afterwards drawn up and signed by the committee and plaintiff in error Stephens. Subsequently the property was purchased for the note holders under the foreclosure sale of the second mortgage in pursuance of said agreement and they raised approximately $49,000 which was used to pay off the outstanding indebtedness above referred to as requiring that amount. A new corporation called the Milo Realty and Investment Company was organized, and plaintiff in error Stephens, was made its president. To this corporation the property was deeded and thereafter a new second mortgage was placed

upon the property, to secure a new issue of notes, amounting to $10 ,000. Most of these notes were delivered to the serial bond holders, who had entered into the agreement so that each of them received an amount of the Lilo Company notes, equal to the amount each held of the old second mortgage notes, plus the amount each had advanced as a part of the $45,00 , and by this arrangement defendants in error, composing the bank, received $1 ,00 of the Lilo Company notes and the old second mortgage notes held by them, were given up. In furtherance of the arrangement between the parties in interest, an additional agreement was, on November 4, 1916 entered into between plaintiffs in error, as the parties of the first part, and those receiving the Lilo Company notes including the bank, as parties of the second part. This agreement after stating the parties, proceeded as follows:

"For and in consideration of the sum of one dollar ($1.00) paid to the parties of the first part by the parties of the second part, receipt of which is hereby acknowledged, and other good and sufficient consideration, it is agreed between the parties hereto as follows, to wit: First. That parties, of the first part agree to purchase from the parties of the second part bonds of the Lilo Realty & Investment Company of the aggregate par value set opposite their respective names, to wit:

Farmers & Merchants Trust Company-----	17,000
State Bank of St.Jacob----------	4,500
First National Bank of Belleville-----	5,000
Union Trust & Savings Bank ----------	[illegible]
Bank of New Athens----------	10,000
First National Bank of Freeburg-------	2,000
H.J.Waltz----------	6,000
First National Bank of Edwardsville---	15,000
Germantown Savings Bank----------	5,000
C.A.Bisl----------	2,000
Hartsleo Savings Bank----------	2,000
A.D.Turner----------	3,000
H.J.Waltz----------	1,000

on or before two years from November 1, 1911, and to pay for the same the par value thereof plus accumulated interest at the time of said purchase and payment. The parties of the first part are to have all unearned coupons attached to said bonds. Second. The parties of the second part, their successors and assigns, hereby agree to deliver, or cause to be delivered, the respective bonds set opposite their names herein upon payment by the parties of the first part of the par value of said bonds and accrued interest thereon, and to deliver the unearned coupons with said bonds at any time within two years from November 1, 1911. Third. It is understood and agreed that in case of any default on any of the interest coupons attached to said bonds that the parties of the first part are to pay the interest represented by the said coupons in default at the time of the purchase of said bonds."]

Plaintiffs in error refused to purchase the bonds when requested so to do and the bank brought a suit in assumpsit on the contract, placing its damages at $12,5[illegible]. Plaintiff in error Stephens, alone was served with summons and filed a plea of the general issue and also a plea of want of consideration for the contract declared upon. Plaintiff in error Gray was not served or defaulted in the case, filed no answer therein and was not represented by counsel, nor did he personally appear in the case. Judgment was entered in favor of the bank in the sum of $11,216.66 against both Plaintiffs in error Stephens and Gray, and afterwards Gray joined with Stephens in a writ of error, bringing the

case here for review. After it was discovered by the court that judgment had been entered against both defendants, its counsel filed a motion in the circuit court at a term subsequent to the term at which the judgment was entered to amend the judgment by erasing the word "defendants" and inserting in its place the word "defendant Walbern . Stephens". The motion was granted and the judgment so amended. Plaintiff in error Stephens alone resisted the motion to amend the judgment.

The first question for our consideration is, did the court have authority to amend the judgment? If it had not the judgment must be reversed as there is no pretense that it could stand against Gray, who was not served with summons. The law seems to be well established that to justify an amendment of a judgment at a subsequent term, the error must be shown by some note or memorandum from the records or quasi records of the court, or by the judge's minutes or some entry in some book required to be kept by law or papers on file in the case, and cannot be determined from the memory of a witness or recollection of a judge himself. Ayer v. City of Chicago 149 Ill. 62; Hubbard v. The People 197 Ill.15. From the files which were produced in evidence in this case, it was shown that Gray was not served with summons and did not answer or enter his appearance, and this was of itself proof that the judgment was inadvertently entered against him, as it is to be presumed that the court will not enter a judgment against a person of whom it has no jurisdiction by service or otherwise. We conclude that the files disclosed such a state of facts as warranted the

the court in amending the judgment and showed fully the amendment that should be made.

It is contended by appellants that the contract sued on was joint and not several and that the bank could only recover in a joint action with the other holders of the Hilo notes or bonds. The contract was not such that the release of one was the release of all but was for a separate and definite amount due each of said bond holders and the liability from plaintiffs in error was for a separate and distinct amount to each. Had all the bond holders sued jointly, separate judgments would have had to be entered as to each bond holder. By the performance of the contract with one of the bond holders, such an one would have had no further interest in the matter. If the contract could be held to be joint only, plaintiff in error might in such case easily avoid his contract as to the others, by settling with one or inducing him not to join in the suit. We are of opinion the contract was several as well as joint and that each bond holder had a right to bring his separate action thereon. It is further insisted that the right to recover was not proven because it was not shown that plaintiffs in error requested the property to be deeded to the Hilo Company. We do not think this claim however, is of serious import as the property was purchased in pursuance of the contract made with the committee by one of the bond holder's committees and deeded to this company, of which plaintiff in error was president, and thereafter the contract sued on was made in which it was provided for the purchase

of the bonds to be issued by the Filo Realty and Investment Company.

Again it is insisted the court erred in admitting in evidence ten ten thousand dollars bonds running [illegible] years, held by the bank, when the original contract with the committee was for bonds running fifteen years. The contract under which the suit is brought, however, was for the purchase of the Filo bonds and if there was any objection to the length of the term, it was waived by plaintiffs in error in entering into the agreement. There is a suggestion made in the briefs of plaintiffs in error that there was no consideration moving to Stephens and Gray for entering into the contract sued on. While the contract was not under seal, a valuable consideration for its execution was recited therein and it cannot be denied that the agreement to purchase the bonds was in fact part of the original transaction whereby the holders of the serial notes undertook to raise the $49,000, buy and deed the property clear of the second mortgage then outstanding and receive in return the bonds secured by a new second mortgage, with an agreement that plaintiffs in error would purchase the same at their par value, plus the accumulated interest. We find no errors in the record which call for the reversal of the judgment in this case and the same will therefore be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.

C. C. Johnson

Clerk of the Appellate Court.

NION

2337

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 554

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

M. F. Diesel,
Defendant in Error

vs.

No. 27
March Term, 1916.

G. J. Diesel,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 27. March Term, 1916. Agenda No.58

L. L. Diesel, Defendant in Error.	
vs.	Error to St. Clair.
G. J. Diesel, Plaintiff in Error.	

Opinion by Higbee, C. J.

---o0o---

This, a suit in tort, was brought by defendant in error L. L. Diesel against plaintiff in error G. J. Diesel. The first count in the declaration charged that the defendant had alienated the affections of the wife of plaintiff in error, the second count charged the same, and also that the defendant had been guilty of lewd and immoral conduct with the plaintiff's wife, and by an amendment charged him with having committed adultery with her. There was a plea of the general issue, a trial by a jury which returned a verdict against defendant, in the sum of $[illegible], a motion by defendant for a new trial, which was overruled, and a judgment in favor of the plaintiff for the amount of the verdict. The defendant below brings the record to this court for review, by a writ of error.

The parties to the suit as shown by the proofs, upon the trial, are first cousins, and defendant in error and his wife were much older than plaintiff in error, who was a physician. Defendant and his wife were married in 1896,

and had five living children. They lived on a farm until 1903, when they moved to the village of Lillstadt, into a house belonging to the wife's father which she afterwards acquired as part of his estate. The house was large and for several years defendant in error conducted a saloon in part of it, using the other part as a residence. Afterwards he quit the saloon business and worked as an engineer. In 1906 Dr. Diesel, who had graduated in medicine two years before, came to Lillstadt and occupied three rooms in the house referred to, one as an office, another as a medicine room and the third for his sleeping room. After the doctor had moved into the house, there seems to have been some dissention between defendant in error and his wife, which became more pronounced from time to time. In the year 1913, the evidence showed many circumstances tending to prove immoral conduct and illicit intercourse on the part of the wife and Dr. Diesel. These conditions continued until about September 7, 1914, when defendant in error left his wife, taking the children with him, and on September 10, 1914, the wife sued for divorce.

On the trial of this case Dr. Diesel offered in evidence the decree of divorce in said cause, but an objection to its admission was sustained by the court. The decree was dated February 4, 1915, and showed the marriage of the parties to have occurred June 26, 1896. It found among other things that complainant had always conducted herself towards her husband with kindness and as a true and faithful wife and in all respects performed her duties

as such; that the husband had ever since said marriage been guilty of extreme and repeated cruelty towards his wife; that he had struck, choked, abused and otherwise mistreated her. Plaintiff in error complains here of the exclusion of this decree from the evidence. The theory of thedefense was that defendant in error had, by his cruelty and abuse, alienated his wife's affections and that such alienation was not caused by the acts of plaintiff in error and the jury were instructed that this was a proper defense. We are of opinion that the decree of divorce granted the wife on the ground of extreme and repeated cruelty, inflicted by her husband, was competent evidence. In Crose v. Rutledge, 81 Ill. 266. Rutledge sued Crose for the seduction of his wife. On the trial defendant offered in evidence the record of a divorce between plaintiff and his wife granted to the wife on cross bill for desertion by the plaintiff. The court below admitted the decree in evidence, but this was held to be error by the supreme court, as it did not tend to prove or disprove any fact in issue. That case however, was different from this, where the grounds on which the divorce was granted, were set up as a defense to the action. In the case of Sackheim v. Miller 136 Ill.App.138, which was a suit by Miller against Sackheim charging the alienation of the affections of the wife of the former by the latter, it was held that a decree ofdivorce granted to Miller's wife at her instance, which was offered in evidence, tended to show that the affections of the wife had been alienated by Miller's own conduct and

was proper evidence in the case. The opinion in the case last named seems applicable to the question presented here and the views there expressed warrant our conclusion as to the admissibility of the decree here in question.

The second instruction given for defendant in error was as follows: "The jury are instructed that if you find for the plaintiff, in estimating the injury he has sustained, you have a right to take into consideration, the wounded feelings and affections of the husband, if any the wrong done to him in his domestic and social relations if any, the stain and dishonor he has sustained if any, the grief and affliction suffered in consequence of the act complained of, if any, and give damages accordingly". It is to be observed that the damages were not confined to the evidence and for this reason, the instruction was erroneous. Similar instructions have been condemned in a number of cases by our courts. Under like circumstances our supreme court has said, "The law required the jury to determine the liability of the defendant from the evidence and from that alone, and an instruction which would permit them to enter into an open field of investigation, cannot be sustained." (City of Freeport v. Isbell 83 Ill.44 ; (see also C.C.C. St.L.Ry.Co.v. Jenkins 174 Ill. 398. Consolidated Coal Co. v. Shepherd 112 Ill.App.458; C. & A. Elc.Ry.Co. v. Kreimel 116 Ill. 253.) Defendant in error insists that this form of instruction was approved by our supreme court in the case of C. & A.R.R.Co. v. Clemminger

178 Ill. 536. A comparison of the two instructions, however, will show that they are entirely different as in the Cleminger case, the jury were directly told that if they found the issues for the plaintiff, he was "entitled to recover such actual damages as the evidence may show he has sustained, etc." confining the damages to those shown by the evidence. It thus appears that the case referred to, is not authority to sustain the giving of the above instruction in this case. For the errors above indicated the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd day of November, A. D. 1916.

C. C. Johnson

Clerk of the Appellate Court.

NOIN

2342

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 562

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Town of Grand Prairie,

Appellee

vs.

No. 34

March Term, 1916.

Fred Schneider,

Appellant

ERROR TO
APPEAL FROM

County COURT

Jefferson COUNTY

TRIAL JUDGE

HON. A. D. WEBB

Term No. 34. March Term, 1914. Appeal No.25

Town of Grand Prairie,)
Appellee)
)
v.) Appeal from Jefferson.
)
Fred Schneider,)
Appellant.)

Opinion by Higbee, P.J.

---oOo---

This was an appeal from a judgment against appellant in a suit brought against him by appellee, for obstructing a public highway in Jefferson county. The suit was instituted before a justice of the peace and an appeal to the ~~County~~ court resulted in a verdict against appellant for $65.17, for which amount and costs of suit, judgment was entered against him.

For many years, as shown by the record, there has been a road running diagonally across section 27 in the town of Grand Prairie in said county, starting at the north east corner, and running to a point near the middle of south line of the south west quarter. The section was heavily timbered and the road in question was simply a trail through the woods, no part of it having been laid out. A few years ago the road was changed by petition as to the north east quarter, so that it ran along its entire east line and thence west half way along the south line of said quarter section. It was also changed by agreement

at the south end, so that it ran along the south line of the section to the south west corner of the south east quarter thereof and thence north on the quarter section line an eighth of a mile from whence the road took the direction of the old trail northeasterly, across the north 60 acres of the west half of said south east quarter of said section 23, connecting with the road laid out by petition as aforesaid at the north west corner of said 60 acres. It thus appears that the old trail has been abandoned and the road platted on section and half section lines except that part passing diagonally across said north 60 acres of the west half of the south east quarter of said section No. 23 and it is with this part that we are now concerned.

Appellant is the owner of said south east quarter of section 23 and prior to the commencement of this suit placed three posts at the side of or across the old trail near the north end of said 60 acres and nailed poles to the same so that teams had to go around them. After he also put wires across the lower end of the road on said tract. But it was for the former obstruction that this suit was brought. Appellee claimed and introduced evidence for the purpose of showing that the place where the obstruction was located, was a public highway acquired by prescription by reason of its having been used as such for a period of fifteen years prior to its obstruction. On the other hand appellant claims as matters of defense, and introduced evidence to show that until within a few

years, the old trail ran across vacant and unoccupied grounds, which had not been fenced; that such trail had been abandoned by the public and two other roads across the land had been used from time to time in place of the same; that there had in fact been no established line of travel across the land in question, but that the trail or traveled way had been shifted from place to place at different times. From an examination of the record we have concluded that the proofs failed to show that the public had acquired a right of way by prescription at the place along the line where appellee claims the old trail was located across the land in question. Nor was it well established by the proof that the obstruction complained of was located on the old trail. Appellant offered to prove by nine different witnesses that they were acquainted with the two roads east of the trail; that such roads had been traveled the last six or seven years by the general public; that the old trail had been abandoned and grown up in brush and trees and ditches so it had become impassible for five or six years and that there were no obstructions on the old trail. The court refused to hear these witnesses on the several points mentioned, upon the ground that the questions involved had been sufficiently covered. These points were essential ones and were strongly controverted and witnesses had been introduced by both appellant and appellee to support their respective claims. It is true that in some cases where a large number of witnesses have been offered upon a question concerning

which there is no controversy, or which seem to have been so fully proven that there can be no further doubt concerning it, it is proper for the court to limit the number of witnesses in order to avoid unnecessary expense and the consumption of unnecessary time. But in this case the abandonment of the old trail and the location of obstructions were questions concerning which the people who were acquainted with the premises, were divided in opinion, and in case one side had a considerable preponderance in its favor, that fact might influence the jury in its behalf.

There had been no limitation as to the number of witnesses on the part of appellee on these points, and we are of opinion that the court erred in limiting the number on the part of appellant. The court appears to have instructed the jury with reasonable accuracy and such faults as are complained of by appellant, can be readily remedied upon another trial. For the error committed by the court in refusing to hear the testimony offered by appellant as above recited, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd day of November, A. D. 1916.

Clerk of the Appellate Court.

NOIN

2374

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

202 I.A. 570

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Christ Knebelkamp,

Appellee

vs.

No. 44

March Term, 1916.

Wiskamp Brothers, et al,

Appellants

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 44. March Term, 1916. Agenda No.16

Christ Knebelkamp,
Appellee
vs. Appeal from St. Clair.
Winkamp Brothers, et al
Appellants.

Opinion by Higbee, P. J.

---oOo---

This is an appeal from a judgment for $191.1[illegible], for the amount due on a promissory note, given by appellants to appellee, for $180 and interest. The case was tried by the court, without a jury and as no propositions of law were presented, it must be presumed that the law was properly applied to the facts in the case. The contention of appellants is that the court erred in rejecting their counterclaim of $135, which should have been allowed as a credit upon the note and in sustaining objections to the introduction in evidence of certain plans and specifications, on the ground that they were immaterial.

The evidence showed that appellants let a contract to appellee, to build a laundry building for them, the original contract price being $386[illegible]. The plans and specifications were for a building one story in height open to the roof. Afterwards the plans were changed by agreement so as to provide for two stories which were to be ceiled. The

additional cost was to be $1055 for changing from one to two stories, to which was to be added $135 for the extra ceiling. Appellants claim that by the change appellee was to be relieved of the expense of trussing the roof and this was to offset the $135 for ceiling. A note for the balance claimed to be due had been given by appellants to appellee, which was renewed from time to time for several years, during which time no claim seems to have been made by appellants of the offset of $135, for the ceiling. When, however appellee refused to further renew the note, this offset appears to have been claimed. One of appellants testified that when appellee refused to renew the note, he was told by witness that he had charged $135 for the ceiling in his bill; that appellee said he did not make that charge but that if he had he would take it off the note. On the other hand appellee testified that when his attention was called to the claimed credit of $135 he said that he would take it out of the note, if it was not charged in the bill. As a matter of fact the bill presented shows the charge of $135 for "extra ceiling in laundry". The question is one of fact and as there was proof sufficient to sustain the finding of the court and the trial judge had the opportunity of seeing and hearing the witnesses, we are not disposed to disturb the finding. It does not appear to us that the specifications which were excluded, would have thrown any light upon the question of fact to be determined by the court, had they been admitted in evidence and there was therefore no error in excluding them.

The judgment will be affirmed.

Affirmed.

Not to be reported in full.

The judgment will be affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd *day of November, A. D. 1916.*

C. C. Johnson,

Clerk of the Appellate Court.

NION

2375

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 572

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

A. J. Mangis,

Appellee

vs.

No. 55

March Term, 1916.

Thomas H. Jones,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Hamilton COUNTY

TRIAL JUDGE

HON. CHARLES H. MILLER

Term No. 55. March Term, 1916. Agenda No. 55

A. J. Mangis, Appellee
v. Appeal from Hamilton.
Thomas L. Jones, Appellant

Opinion by Higbee, C. J.

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The parties to this suit each owned an 80 acre tract of land in the same section in Hamilton County, Illinois, the north 40 of appellant's land joining appellee's east 40 on the south. Appellee's land was rented for crop rent to a tenant. The land had long been in possession of the respective owners and those under whom they claimed title. There had existed a dispute for a long time between the parties, appellant claiming a strip off the south side of appellee's adjoining 40. On June 13, 1914, appellant entered on the land and ran a two wire fence east and west across the same. This fence was about six rods north from the old corner at one end and 12 rods at the other and cut off between 4 and 5 acres of appellee's land. Appellee's tenant had most of this strip in corn, but the balance was in brush and pasture. Appellee caused a criminal suit for trespass to be instituted against appellant, which was finally brought to this court and on appeal decided in favor of appellant on the ground that he had not been served

with the notice required by statute, to make the entering upon the land a criminal offense. (See People v. Jones 186 Ill.App.278). Appellee also brought this suit against appellant before a justice of the peace, which was a civil suit to recover damages. On appeal from the justice of the peace to the circuit court, where the case was tried without a jury, the court found the issues for appellee, assessed his damages at $5 and entered judgment against appellant for that amount and costs.

Appellant on the trial sought to show title to the strip of land in controversy by survey and deeds to his forty while appellee introduced evidence tending to show that he and those through whom he claimed title, had been in possession of the premises for more than twenty years under claim of ownership. The only questions, however, raised and argued on this appeal are, did the justice of the peace have jurisdiction of the suit brought and if so had appellee, who was not himself in actual possession of the premises the right to maintain an action for damages? It is contended by appellant that the justice was without jurisdiction to hear the cause because he claimed the strip of land in question in good faith and the main question on the trial, was the ownership thereof; that appellee's only remedy was to bring his suit in a court of competent jurisdiction to try titles to real estate. It appears to us, however, that it was not necessary in this case to determine the legal title to the strip of land in controversy and that the justice of the peace did not have to pass upon that question. Appellee, either by himself or his tenant

was in possession of the premises and appellant had no right to enter upon the same and take the possession away from him without due process of law. By entering upon said premises, building afence thereon and taking possession thereof for his own uses; appellant committed an injury to the real estate for which the party injured had a right to bring suit before a justice of the peace under that provision of the statute, which gives justices jurisdiction "In actions for damages for injury to real property". Rev. Stat.chap.79.Art.2, Sec.1, Clause 5. The question is not a new one on appeal in this state. The jurisdiction of a justice of the peace in such cases, is to be determined, not by what may be considered in the proofs but by the question whether he has power under the statute to render valid judgment in the case and while a freehold may be incidentally involved, yet if he has jurisdiction to give a judgment in response to the action. The fact that the freehold is so involved, does not deprive the justice of jurisdiction as he can enter no judgment affecting the title to the land. This suit is for damages to real estate and the judgment is for such damages and does not pretend to affect the title. Litte v. Looby, 142 Ill.534, was a suit for damages caused to real estate by cutting timber. Both the parties to the suit claimed the land, but the court found that the justice of the peace had power to render judgment for damages, saying "We are aware of no principle upon which we could be justified in holding that the damages here sued for are not such as justices of the peace are given jurisdiction of by the language above", referring to the statute giving juris-

diction to justices of the peace "in actions for damages to real property". To the same effect is Conine v. Whittrick, 186 Ill.324, which is quoted with approval in Boyd v. Rimmel 244 Ill.545. In the case last referred to, one of the parties had taken down a division fence, moved it onto lands claimed by the other and taken possession of land thereby included in his own premises. In that case the chief issue, to which the evidence was directed was the location of the correct boundary line between the lands of the parties to the litigation, as was the case here. The suit was brought in the county court under that provision of the county court act, which provides "The county courts shall have concurrent jurisdiction with the circuit courts in all that class of cases, wherein justice of the peace now have or may hereafter have jurisdiction etc. The court there said, "Under the authorities we are constrained to hold that the county court did not have jurisdiction to try a case involving a freehold and render ajudgment binding as to the title, although it did have jurisdiction to hear an action of damages, not exceeding a $1000 for injury to real property. While a free hold was incidentally involved in the litigation, no judgment could rightfully be rendered that either party was possessed of a freehold under any possible evidence," and it was there held that the county court had jurisdiction of the case. To decide that the justice of the peace in this case had no jurisdiction, would be contrary to the holdings of the cases above mentioned and many others therein cited.

The next question to be determined is whether or not the suit could be brought properly by appellee who had leased the premises to another. It is provided by section 36 of our practice Act that "It shall be lawful for any owner of real estate though not in possession of the same, where the same is in possession of some person or persons, claiming under him, as tenant or otherwise, to bring an action in trespass or case, for any injury to his rights in such land as owner, reversioner, remainderman or otherwise, the same as if in possession of said land against the person or persons, claiming under him or against a stranger committing trespass or injury to the rights of such person in said land." In referring to this statute, this court said in White v. Main 149 Ill.App.348, "It would seem rather that the remedy by action in trespass to real estate, has been enlarged or extended by the statute. The reversioner or remainderman, though not in possession, may now have his action in trespass against any other person, whether in possession of the premises or not, for an injury to his right or interest in the land, whereas, before the statute was enacted, he could not maintain such action unless in possession." The building of the fence upon appellee's land and taking possession thereof by appellant, was an injury to appellee as reversioner and under the statute he clearly had a right to sue for the damages which accrued to him.

It is further claimed by appellant that even if appellee was the proper person to bring this suit, that he failed to prove any legitimate damage. If appellee could

properly bring the suit and appellant had wrongfully taken possession of the premises, he was entitled to recover at least nominal damages, and under the facts proven, showing the acts done by appellant, and the manner in which he took possession of the premises, the judgment of $5 in favor of appellee, cannot be considered excessive. No propositions of law were presented to the trial court to be passed upon, no question has been made concerning the ruling of the court in regard to the evidence, and the proofs appear to support the judgment, which will therefore be affirmed.

Since the submission of this case and the preparation of the above opinion the suggestion of the death of the Appellee A. J. Langis has been made and by leave of court the name of James C. Boyer, Administrator of the estate of A. J. Langis, deceased, has been substituted as Appellee.

Judgment Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 20th *day of November, A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

NION

250

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 599

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mahala Threlkeld,

Appellee.

vs.

No. 67

March Term, 1916.

Joe Norwodowski et al,

Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN

Term No. 67. March Term, 1916. Agenda No.52

Mahala Threlkeld, Appellee

v.

Joe Norwodowski et al, Appellants

Appeal from Franklin.

Opinion by Higbee, P. J.

000-000

Appellee, Mahala Threlkeld, sued appellants, a number of saloon keepers in West City, Franklin county, Illinois, under the dram shop act, for injury to her means of support in consequence of the intoxication of her son, Fred Threlkeld, who died of alcoholic poisoning, on March 15, 1913, when he was 27 years of age. The proofs showed that plaintiff lived with her husband and family, that they had a home worth about $1500, and he owned some land in Missouri worth about $500 and also had a small amount of money, that the son lived with them and for several years had been drinking heavily. He was a painter, and when working made from three to five dollars a day, and gave his mother some three to five dollars a week. The proofs were ample to sustain the charge that the intoxication of the deceased was caused in a large degree by liquor bought of appellants. Some question is raised by appellant, William Hutton as to the right of appellee to sustain a judgment

Judgment

Opinion by Bigham, P. J.

CON-CUR

against him, he claiming that the proof did not show that he sold intoxicating liquor to the deceased, and he testified that he was not operating his saloon until after the date of Threlkeld's death. This testimony, however, was overcome by that of four or five witnesses, who swore to having seen Threlkeld in Hutton's saloon. The amount of the verdict in favor of appellee, for which judgment was given, was $1000.

Appellant contends that as appellee and her husband were possessed of some property, and it does not appear that she was dependent on her son for support, that she is not entitled to recover under the dram shop act. The statute provides that "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person or in consequence of the intoxication, habitual or otherwise of any person, shall have a right of action in his or her own name, severally or jointly against any person or persons, who shall by selling or giving intoxicating liquors, have caused the intoxication in whole or in part, of such person or persons". Rev. Stat. Chap. 43 Sec. 9. Without going into details we think the proof in this case was sufficient to show that deceased, when employed, gave his mother part of his wages, substantially every week and that by his death, she has lost the money so contributed to her and has been injured to that extent in her means of support. Upon the whole the proofs seem to show a right in appellee to maintain her action. We find,

however, that there were errors committed by the trial court in instructing the jury at the instance of appellee, which entitled appellants to a new trial.

The second instruction given for appellee was as follows: "The court further instructs the jury that if you find for the plaintiff, in this case, she will be entitled to recover such reasonable sum of money, as in your judgment, for the actual damage, if any, she has sustained to her means of support, caused by the death of her said son Fred Threlkeld, not to exceed, however, the sum of $10,000 as charged in the declaration". This instruction did not confine the damages to such an amount as she was shown to have sustained by the evidence, but left it to the jury to give such an amount, as in their judgment would compensate her for the damages she had sustained regardless of the proofs in the case. The failure to restrict the damages to the amount as shown by the proof was erroneous and was especially prejudicial to appellants in this case, as there was no other instruction covering the defect, than the one complained of. Instructions similar in effect, were held to be erroneous in Consolidated Coal Co.v. Shepherd 112 Ill. App.458 and C.& E.Elec.Ry.Co.v.Krompel 116 Ill.App.263. Instruction No. 5 undertook to state all the elements going to constitute the damages to plaintiff, and told the jury that, "From a due consideration of all these factors, you may estimate and find the amount of pecuniary injury, which the plaintiff has sustained in her means of support, by the death of her said son, and award her such amount as damages

against the defendants".. The error of this instruction was that the elements were not confined to such as had been proven by the evidence, but without reference to the evidence, assumed that they had been proven and that the jury would consider only such facts as had been shown. A further vice of this instruction was that it named as an element to be considered by the jury, in estimating the damage of appellee, the probable expectancy of life of her son Fred Threlkeld and contained no reference to probable expectacy of the life of appellee. This element should either have been omitted from the instruction or the jury should have been told they could consider the probable expectancy of life of both appellee and her deceased son. In the case of Petting v. Robbett, 142 Ill.72, which was a case under the Dram Shop Act, it is said "manifestly in the case of the death of the husband, the loss to the wife's means of support, is co-extensive with the duration of her life". This doctrine is equally true in this case where the mother sues for the death of the son. For the errors committed in giving the instructions above referred to, on behalf of appellee, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th day of November, A. D. 1916.

Clerk of the Appellate Court.

NOIN

2351

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 601

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

S. E. Pirtle,

Appellee

vs.

No. 68

March Term, 1916.

H. E. Gray, et al,

Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Clay COUNTY

TRIAL JUDGE

HON. JAS. C. McBRIDE

Term No. 68. March Term, 1916. Agenda No.65

S. A. Firtle,
Appellee
v.
H. E. Gray, et al,
Malcolm F. Steel, trading as
Hardware Company,
Appellants
Appeal from Clay.

Opinion by Higbee, P. J.

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Appellee in the latter part of the year 1913, was building for his home, a dwelling house in the city of Flora, Illinois. It was a two story house with four rooms below, three rooms above, a bath room and a sleeping porch. There were also halls and a basement in which a hot air heater was installed. He had purchased his bath room fixtures in Chicago, and employed appellants, who were doing a plumbing business as co-partners, under the firm name of the Decker Hardware Company, to install the same and furnish the iron pipe and fittings necessary to do the work. This was for a stipulated contract price, and in addition thereto, the firm agreed to furnish any fittings that were short and replace any that were defective, for which appellee was to pay them. The work was finished about January 15, 1914 and a short time thereafter, appellee and his wife moved in. During the month of June, while appellee and his wife were absent from home, he was notified his house was flooded and hurrying to it, he found that a large amount of water, after-

wards estimated at about two thousand gallons, [illegible]d came into the bath room from the city mains, by reason of an improperly attached slip-joint union, where the pipe joined the bath tub.

Appellee brought suit against appellants to recover damages on account of their carelessness and neglect in not doing the work in a safe and workmanlike manner, as contracted for, by reason whereof the union became loose, leaky, unpacked and open and allowed the water to escape and flood the house. On appellants' motion, appellee filed a bill of particulars, showing damages to carpets, furniture, wall paper, plastering, flooring, doors, heating and lighting systems and paint. A plea of the general issue was filed and upon trial, thejury returned a verdict for appellee in the sum of $500. A motion for a new trial was overruled and judgment entered against appellants for that amount. It is urged by appellants on this appeal, that the jury were erroneously instructed on the part of appellee, that improper evidence was admitted and that the verdict was excessive.

Appellants complain of three instructions given for appellee, which told the jury if they found for him, they should assess his damages at such sum as they believed from the evidence, he had sustained. The objections raised were that the instructions did not confine the damages to such an amount as would compensate appellee for his injury, and furth did not state that the finding must be from a preponderance of the evidence. It is claimed by appellants that under these instructions, the jury might properly assess punitive

damages, whereas under appellants instructions, the damages would clearly be compensatory only and that therefore the instructionsfor appellant and appellee laid down contradictory rules for the guidance of the jury. Appellants' fourth instruction in fact told the jury that appellee could only recover such damages as were shown by a preponderance of the evidence to have been the natural and proximate consequence of the acts complained of in the declaration. It is true that where the instructions given in a case state contrary propositions of law and are conflicting, so that the jury cannot tell which rule they should follow, they necessarily tend to mislead and a judgment based thereon should be reversed unless the court could clearly see that no prejudice had resulted. Emery v. Ginnan 24 Ill.App.65; C.P.& Q.R.R.Co.v. Harwood, 80 Ill.88. Under the pleadings including the Bill of Particulars and on the instructions the jury could not have assessed punitive damages, and upon the trial of the case such damages were not asked nor were such damages recovered, so plaintiff was not injured in the respect complained of by such instruction. The three instructions complained of as given for appellee, were not at variance with or contradictory of the fourth instruction, given for appellants but the latter more clearly stated the law and was supplemental to the former and all required the jury to base their verdict upon the evidence. The instructions taken as a series, could not have misled the jury in regard to the measure of damages and the court did not err in giving the same. It is also urged by appellantthat these instructions

allowed the jury to assess the damages at such sum as they believed from the evidence the plaintiff had sustained; instead of saying from a "preponderance of the evidence". By the appellants instructions the jury were told that appellee must make out his cause of action, by a preponderance of the evidence and that he was only entitled to recover such damages as he had shown by a preponderance of the evidence were the natural and proximate consequences of the acts complained of in the declaration, and one of their instructions was devoted almost wholly to explaining to the jury what was meant by a "preponderance of the evidence". The jury were therefore instructed as to the requirements in regard to the evidence and as to what a preponderance of the evidence meant, and were not misled in that regard. But even if the jury had not been so fully instructed in this regard, we do not think the expression complained of is so objectionable as to constitute error. In regard to similar instructions it is said by our supreme court in Lonk Bros.Coal Co.v. Th'el, 228 Ill.232. "The objection that the instruction uses the expression, 'as the jury may believe from the evidence', omitting the word 'preponderance' before the word 'evidence', we do not regard as tenable. This form of expression has been employed so long by courts and lawyers as to become a fixed practice....'if you believe from the evidence' means no more nor no less than 'if you believe from a preponderance of the evidence'. The fact that the belief of the jury is based on the evidence is the essential thing." Appellant objects to that portion of the evidence wherein estimates were given of the damages sustained by appellee by water over-

flowing his dwelling. While an examination of the evidence upon this question, shows that the objection raised is not without merit, it cannot be considered here, as it appears from the record that all such testimony was heard without objection by appellants on the trial.

It remains to consider the further claim of appellants that the damages allowed appellee, are excessive. It does not appear to be contested that appellee was entitled to recover some damages. As to the amount of damages suffered by him, the evidence of the respective parties covered a wide range and had the jury followed the estimates, of some of the witnesses, the damages might have been fixed at so high a sum as $8[illegible]0 instead of the sum of $5[illegible]0 as found by them. It is for the jury to determine from all the evidence, under the instructions given, what was the proper amount to be paid appellee and to compensate him for the pecuniary loss he had sustained by the flooding of his premises and the amount arrived at, was warranted by the proofs, and no good reason appears why the verdict of the jury in this regard should be disturbed. The judgment of the court below will be affirmed.

Affirmed.

Mr. Justice McBride having tried the case below, took no part on the hearing in this court.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th *day of November, A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

NION

2352

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 602

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

E. Bucher Packing Co.,
Appellee.

vs.

No. 71.
March Term, 1916.

Joe McAllister et al,
Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Pulaski COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 71. March Term, 1916. Agenda No.7

E.Bucher Packing Company,)
Appellee)
)
v.) Appeal from Pul aski.
)
Joe McAllister,et al,)
Appellants.)
J. Hudson

Opinion by Higbee, P. J.

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Appellant, Joe McAllister, was a tenant of appellee E.Bucher Packing Company, and also ran an account with it. On October 11, 1915, the account amounted to $371.43 and on that day, appellee caused a writ of attachment to be issued and levied on McAllister's interest in a crop of corn, growing upon the farm of one T.Johnson. Afterwards appellee filed its declaration in assumpsit in the suit. McAllister traversed the affidavit in attachment and filed a plea of the general issue, plea of set off of $600 and notice of special matters in defence, and issue was joined. Thereafter T.J.Hudson filed an interpleader in the case, claiming the property under a chattel mortgage executed to him by McAllister. A jury was waived and the case heard by the court.

McAllister claimed the $600 set-off was due from appellee on account of its failure to carry out the rental contract which it introduced in evidence, wherein it was agreed that appellee was to pay for one half of the feed for two teams, which for two years was claimed to amount to $600. Appellee introduced evidence tending to show that this part

Term No. 71. Santa Fe, 1918. Margin 32.71

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{ }
{ Jurisdiction, ex }
{ Appellants. }

Opinion by Ritter, J. 1.

---oOo---

of the contract was changed and that appellant besides farming the land, had brought a lot of mules and fed them on the farm and used them for other purposes. Also that on the account stated between them, no claim was made by McAllister for the feed. On the other hand McAllister swore that he never asked appellee at any time to furnish one cent of the expense of feeding the extra mules and introduced other testimony tending to support his traverse of the affidavit of attachment and sustained his plea. The trial court after hearing the proofs refused to allow McAllister a set off for any amount, found the issues for appellee and gave judgment in its favor for the sum of $371.41 and costs. McAllister excepted and prosecuted an appeal to this court. While there was a controversy raised by the evidence introduced by appellee and McAllister, the proof was sufficient to sustain the finding and judgment of the court below and the same will not be disturbed.

The defendant Hudson introduced in evidence a chattel mortgage on said corn crop, for $1000, executed by McAllister, claiming there was due him thereon the following amounts, to-wit, $77.21, which was due at the time the mortgage was made; $71 on account of two outstanding notes he had executed, as security for McAllister and $109.15 advanced after the mortgage was given. Of these amounts the court found the sum of $77.21 alone to be a prior lien to the attachment writ of appellee and the court gave judgment in favor of Hudson for that amount to be paid out of the fund derived from a sale of said corn made by consent of the parties. Hudson excepted but neither prayed for nor effected an appeal to this court, al-

though he signed the appeal bond given by McAllister, which referred alone to the judgment given against the latter. Appellee filed a motion in this court to dismiss the appeal for the reason that Hudson had neither prayed an appeal when the judgment was entered nor given an appeal bond and that motion was taken with the case. Hudson joined in the assignment of errors in the brief and argument filed in this case. It is claim, however, that the case, so far as it relates to Hudson is not properly in this court for consideration. It is imperative that an appeal must be prayed for and allowed at the term at which the judgment or order or decree is entered. Rev. Stat.chap.110 sec.92. Finch v. Finch, 111 Ill.App.481. "The right to prosecute an appeal from a judgment or decree is purely statutory and can only be taken when allowed by an order of the court and in conformity with the order of the court." Lingle v.Chicago, 216 Ill.8[illegible]. The motion of appellee to dismiss the appeal of Hudson must therefore be sustained.

There were no propositions of law presented by the appellant McAllister and no question was raised as to the correctness of the rulings of the court upon the evidence, so far as the same related to the case of appellant McAllister, so it must be presumed that the court applied the law to the facts in the case correctly. The judgment of the court below will accordingly be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th *day of November, A. D. 1916.*

C. C. Johnson,

Clerk of the Appellate Court.

NION

2353

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

202 I.A. 604

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Stanley Steffey, by his next Friend, A. M. Steffey,

Appellee.

vs.

No. 78.

March Term, 1916.

Henry Sandifer et al,

Appellants.

ERROR TO
APPEAL FROM

Circuit COURT

Lawrence COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 78. March Term, 1916. Agenda No.13

Stanley Steffey, by his next Friend, A. M. Steffey, Appellee

v.

Henry Sandifer et al, Appellants

Appeal from Lawrence.

Opinion by Higbee, P. J.

---oOo---

This is a suit in case brought by Stanley Steffey, a minor of school age and a resident of school district No. 24 of Lawrence County, Illinois, by A.M. Steffey his father and next friend, against the directors of said district. A demurrer to the declaration was overruled, trial had on the plea of general issue and a verdict found against the directors, placing the damages at $100. Motions for new trial and in arrest of judgment overruled and judgment entered for the amount of the verdict.

The following appear to be the facts in the case as shown by the record: There were two school houses in the district, one near the west side called Birds school house and the other on the east side called the Lord school house. They both faced a public road running east and west through the district and near the middle of the district, A.M. Steffey lived on his farm with his wife and two minor children, one of them being the ~~appellee herein~~ plaintiff. The house in which he lived, on the farm, was on the same road as the two school

Term No. 78. March Term, 1916. Appeals from

Stanley Hetley, by his next
friend, A. E. Stanley,
Appellee

v. Appeal from Lawrence.

Henry Bandifer et al,
Appellants

Opinion by Higbee, J. J.

---oOo---

This is a suit in case brought by Stanley Hetley, a minor of school age and a resident of school district #4 of Lawrence County, Illinois, by A. E. Stanley his next friend, against the directors of said district. A demurrer to the declaration was overruled, trial had on the plea of general issue and a verdict found against the directors, placing the damages at $100. Motions for new trial and in arrest of judgment overruled and judgment entered for the amount of the verdict.

The following appear to be the facts in the case as shown by the record: There were two school houses in the district, one near the west side called the west school house and the other on the east side called the east school house. They both fronted a public road running east and west through the district and near the middle of the district, W. Hetley lived on his farm with his wife and two minor children, one of them being the appellee herein. The house in which

houses and about 200 feet further from the Ford school than it was from the Birds school. The Steffey children had been in the habit of attending the Birds school but in the fall of 1914 in allotting the children of the district to the two schools, the directors drew an imaginary line north and south through the district and allotted the children east of the line to the Ford school and those west to the Birds school. This line ran west of ~~appellee's~~ plaintiff's home and his father was notified to send his children to the Ford school. The father objected to this and sent his children to the Birds school when it opened in September. After a time the teacher refused to teach ~~appellee~~ plaintiff and later, in October, his father moved with his family to a small house in the village of Birds not far from the Birds school house and within the territory set apart for pupils of that school. The directors however, appear to have insisted that the removal was not made in good faith or intended to be permanent and under their direction, the teacher still refused to give instruction to ~~appellee~~ plaintiff. This condition of affairs continued until the latter part of January, 1915 when this ~~suit~~ action was begun against the directors and teacher. The jury found the directors alone guilty and they are prosecuting this appeal.

Appellants complain that the declaration did not state a good cause of action because it did not charge directly that the act was wilful or malicious but that such charge was only inferentially stated. We find however that the single count of the declaration in charging the denial to appellee and his brother of the right of an education in said school, states that said denial "was caused by no im-

proper conduct on the part of either of the said minors and from the reason that they or either of them had disobeyed the rules and regulations of the said school as provided by the said directors or the said teacher in charge, but was from the wilful and malicious and unlawful conduct to them by the said defendants so that they could be denied the use of the said school and instruction of the same". This appears to us to have been a sufficient charge of wilfulness and maliciousness on the part of appellants and the court properly overruled the demurrer to the declaration.

Appellee insists that the judgment in this case must be affirmed for the reason that the bill of exceptions does not state that it contains all the evidence introduced on the trial of the case and the certificate of the trial judge does not certify to that fact. A careful examination of the bill of exceptions fails to disclose any statement therein that it contains all the evidence in the case and the certificate of the trial judge contains no statement whatever in reference to that matter. Appellants insist that certain statements made by counsel for the respective parties appearing in different portions of the bill of exceptions are sufficient to indicate that the bill contained all the evidence. This claim does not appear to us to be sound as the statements recited by appellant do not seem to us to be sufficient to bring this case within the rule laid down in the case of the People v. Scanlan 265 Ill.679 relied on by appellant. It is true that the record contains a certificate of R.B.Campbell who states that he is official reporter

of the court and certifies "that the above and foregoing is a true and correct copy of all the evidence that was heard by the court on the trial of said cause etc." This certificate is full and complete but is included in the record after the signature of the trial judge to the bill of exceptions and is no part of that bill. This court in Continental Casualty Co.v. Maxwell 127 Ill.App.19, in speaking of a record where the bill of exceptions did not state that it contained all the evidence and the trial judge failed to so certify, but where there was bound with the record a certificate of the Official reporter "that the foregoing is a true and correct copy of all the evidence," said "this does not meet the requirements of the law. A reporter's certificate has no place in a bill of exceptions. It must be stated in the bill of exceptions that it contains all the evidence or it must be so stated in the judge's certificate". There being no sufficient bill of exceptions in the record we must assume that the verdict of the jury was correct upon the facts. James v. Dexter 113 Ill.654; Eggleston v. Trust Co.205 Ill.170.

We have, however, read the facts in this case as disclosed by the purported bill of exceptions and if they were presented in such way that we could consider them, we would not feel at liberty from what they show to disturb the verdict. Although the parents lived east of the line made by the directors, when the school opened in September, the proof was sufficient to sustain the jury in finding that they had moved west of the line and lived within a

quarter of a mile of the Birds school in October, and that appellee was refused instruction in the Birds school after the family, including appellee, had taken up their residence in the territory allotted to that school. The proofs do not disclose any crowded condition of the Birds school or any particular reason why it would be for the best interests of the district that appellee should go to the Ford school after the removal of the family in October, instead of the one close to him. He had attended this school in former years, and during that time it does not appear that he had been guilty of any misconduct. The circumstances so far as shown by the purported bill of exceptions afford no valid excuse on the part of the directors for refusing appellee the right to attend the Birds school.

A suggestion is made by appellants that the court erred in refusing certain of its instructions and modifying others. The errors complained of are not pointed out however and an examination of these instructions, disclose no error upon the part of the court in the action taken in regard to the same. The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

not to be reported in full.

Affirmed.

be affirmed.

regard to the case. The judgment of the court below will

error upon the part of the court in the action taken in

ever, no exception of there instruction, directs no

other. The error complained of are not pointed out here-

erred in refusing certain of its instructions and qualifying

A examination is made by appellants that the court

right to attend the Uvalde school.

excused on the part of the directors for refusing appellee the

as shown by the uncontroverted bill of exceptions attend a big

been guilty of any misconduct. The circumstances so far

years, and during that time it does not appear that he has

one close to him. He had attended this school in former

after the removal of the family in October, instead of the

of the district that appellee should go to the rural school

particular reason why it would be for the best interests

objections may crowded condition of the third school or any

in the territory allotted to that school. The mere de not

the family, including appelling, had taken up their residence

quarter of a mile of the Uvalde school in October, and that

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th *day of November, A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

NOIN

2356

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 616

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry Hawk,

Appellee

vs.

No. 81

March Term, 1916.

Farmers' Serum Company,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 81. March Term, 1916. Agenda No.67

Henry Hawk,
Appellee)
)
v.) Appeal from Madison.
)
Farmers' Serum Company,)
Appellant)

Opinion by Higbee, P. J.

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Appellee was a tenant on 160 acres of land in Madison county, Illinois. Among other crops growing on the land during the season of 1914 were five acres of sweet corn and eleven acres of wheat, all of which belonged to appellee, and he also owned one half interest in twelve acres of field corn on the land. Appellant had some 2,00 hogs on an adjoining farm. Along in the summer when the crops were nearing maturity, the hogs got into appellee's fields and destroyed all but one wagon load of the sweet corn and so injured the other crops that only 60 bushels of wheat and 12 of field corn were saved. Appellant introduced no evidence on the trial. The jury returned a verdict for $[illegible] in favor of appellee. A motion for a new trial was overruled and judgment entered against appellant for said amount and the costs of suit. On this appeal the sole question raised by appellant for a reversal is that the damages allowed, are excessive.

The evidence consisted of the testimony of seven witnesses on the part of appellee and by them it was shown the damage was caused by appellant's hogs; that the sweet corn

Case No. 61. Argued Jan., 1910. Appeal No. 87

Henry Kane,
Appellee
v.
Lancaster County Commrs.,
Appellant

Opinion by Ryder, J. P.

Appellee was a lunatic in the county of Lancaster, Pennsylvania. During either term preceding or the term ending the second of 1907 were [illegible] and given notice of about, all of which [illegible] appellee, and he also caused one Dr. Ingersoll to examine [illegible] upon the bond. Objections [illegible] to the petitioning [illegible]. Along in the summer when [illegible] ing maturity, the city put into execution [illegible] struck out the whole [illegible] found the other terms that only [illegible] of [illegible] were named. [illegible] on the trial. The jury returned a verdict [illegible] at [illegible]. A motion for a new trial was [illegible] judgment entered against appellant for [illegible] costs of suit. On this appeal the only question [illegible] specification for a reversal is that [illegible] erroneous.

The evidence submitted at the [illegible] given at variance on the part of appellee and by [illegible] Dancer was owing by appellant's [illegible] that the amount [illegible]

was ready for market, the wheat in the head and that there were good crops of both. The market value of these crops and the cost of gathering and marketing the same were also shown. By the same witnesses it was shown that the probable amount of each crop would be, the character of appellee's soil and the yield of the same crops on like land in that vicinity. In the same manner the value of the field corn lost was arrived at. While the estimates of the several witnesses to some extent varied the amount of the verdict is fully sustained by the evidence. The amount of the damages accruing to appellee was a question of fact to be determined by the jury from the evidence, and we have discovered no reason from the record, for disturbing their verdict.

It is complained by appellant that appellee was not permitted to answer the question whether he had instituted a former suit against another person for the loss of the same crop before a justice of the peace, in which the damages were laid at $200, while the fact that appellee had brought this former suit, fixing his damages at a much lower amount than recovered in this suit was proper, as tending to show the estimate he placed upon the amount of his loss at that time, yet it appears from the record that the same question had already been asked appellee and answered by him, in the affirmative and it was not therefore error to refuse a repetition of the question already answered.

The judgment in this case will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 20th *day of November, A. D. 1916.*

C. C. Johnson,

Clerk of the Appellate Court.

NION

2357

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 617

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Max Rosenfeld,

Plaintiff in Error.

vs.

No. 5.

March Term, 1916.

John B. Ehrhart,

Defendant in Error.

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. W. E. HADLEY.

Term No. 5 In the Appellate Court Agenda No.18

Fourth District.

March Term, A. D. 1916.

Max Rosenfeld, Plaintiff in error) Writ of Error to the
vs) Circuit Court of
John D. Ehrhart, Defendant in error) Madison County.

Opinion by Boggs, J.

An action of replevin was brought by defendant in error at the October Term, 1911, in the Circuit Court of Madison County to replevin certain merchandise, fixtures, etc., used in connection with the grocery store before that time operated by plaintiff in error in the city of Venice in said County. The declaration consisted of two counts. The first count charges that the plaintiff in error took possession of and detained the goods, chattels and personal property of the defendant in error, alleging damages, etc. The second count was a count in trover. Plaintiff in error filed a plea of property in him, a plea of *non cepit* and a plea of not guilty. A replication was filed by defendant in error to the plea of property. The issue being joined a trial was had by the court without a jury. A finding was made in favor of defendant in error, plaintiff in the court below, as to all property replevined except the contents of a certain safe, awarding damages of $1.00, costs, etc. against plaintiff in error, from

Term No. B In the Appellate Court

Fourth District.

March Term, A. D. 1918.

Isaac Townsend, Plaintiff in error

vs.

John S. Mabrey, Defendant in error } Error to the Circuit Court of Sheldon County.

Opinion by Cogne, J.

An action of trespass was brought by defendant in error at the October Term, 1917, in the Circuit Court of Sheldon County to recover certain merchandise, fixtures, etc., used in connection with the grocery store before that time operated by plaintiff in error in the city of Venice in said County. The declaration contains two counts. The first count charges that the plaintiff in error took possession of and detained the goods, chattels and personal property of the defendant in error, attaching damages, etc. The second count was a count in trover. Plaintiff in error filed a plea of property in him, a plea of non cepit and a plea of not guilty. A replication was filed by defendant in error to the plea of property. The issue being joined a trial was had by the court without a jury. A finding was made in favor of defendant in error, plaintiff in the court below, he to all recovery herein and it [illegible] of error, [illegible]

said judgment this writ of error is prosecuted.

No propositions of law were submitted by defendant in error. Plaintiff in error tendered fourteen propositions of law, the first, second and sixth were held by the court. All others were refused.

The proposition most seriously contended for by plaintiff in error for a reversal of the judgment in this case is that the evidence is not sufficient to support the finding and judgment of the trial court. The record discloses that plaintiff in error was desirous of selling or trading a certain stock of groceries owned by him and had placed the same in the hands of one C. F. Moreland, for that purpose. Through Moreland the parties to this proceeding became acquainted and made considerable investigation of the respective properties proposed to be exchanged by them. On the 25th day of May 1911, a contract was entered into by which plaintiff in error agreed to exchange his stock of goods, fixtures, horses, wagons, etc., for a house and lot owned by defendant in error located in the city of St. Louis, subject to a mortgage or trust deed for $2500.00.

Said contract provided among other things that the title to the property to be conveyed by defendant in error was to be perfect and to be conveyed by general warranty deed, free from liens and incumbrances, except taxes, general and special for the year 1910.

The real controversy between plaintiff in error and defendant in error arises with reference to what took place after the execution of the contract entered into by them. The evidence on the part of the defendant in error is to the effect that after making of said contract it was agreed by said parties that they would meet the next day

for the purpose of consummating their said trade; that in keeping with this agreement they met; and that in consumation of said contract, plaintiff in error assigned the lease held by him on the store building in which his stock was located to defendant in error, and also assigned the insurance on the stock of goods, fixtures, etc; that he caused to be prepared a bill of sale for said stock of goods, fixtures, horses, wagon, etc. but that the same was not delivered by plaintiff in error for the reason that he was also to procure the signature of his wife thereto; that the land lord who owned the building occupied by plaintiff in error with his said stock of goods, fixtures, etc., refused to accept defendant in error as a tenant instead of plaintiff in error without first investigating the financial responsibility of defendant in error. The evidence on the part of defendant in error is further to the effect that upon the refusal of said land lord to accept defendant in error as a tenant, said parties went to the attorney for plaintiff in error who suggested that they go on and close up their said contract and that plaintiff in error deliver the possession of the stock of goods, fixtures, etc., to defendant in error and that the plaintiff in error remain liable on said lease for said store building and look to defendant in error to take care of said rent.

The evidence on the part of the defendant in error is further to the effect that acting on the suggestion of plaintiff in error's attorney, plaintiff in error went with defendant in error to said store and there turned over

the possession of the stock of goods, fixtures, etc. to defendant in error; that they counted the money in the cash register, and the plaintiff in error instructed him with reference to the operation of the cash register, how to lock the doors, etc.

The testimony of the defendant in error is further to the effect that he and plaintiff in error instructed the cashier at the store to make out new books in order that plaintiff in error might have the old books to take care of his accounts and to take them from the store; that when the store was closed that evening he delivered the key to the front door of the store to plaintiff in error with the understanding that plaintiff in error should open the same the next morning and that he would be back the next afternoon; that when he came back the next day, being Saturday, plaintiff in error refused to quit the store and that some altercation took place between him and defendant in error, and that he finally left the store and this proceeding was brought to regain possession of said stock of goods.

Defendant in error is corroborated as to what took place in the store with reference to delivering possession, by the witness, Frances Young, bookkeeper therein; who testified that the books were changed by her on the direction of plaintiff in error and that as to all people that were coming in from then on she was to put their names on the new books; that when she came back to work on the next morning she understood she was working for defendant in error

and that her employment by plaintiff in error terminated on the evening before. This witness further testified that plaintiff in error in answer to the question, "You did not sell out, did you?" propounded by the mother of said witness, that plaintiff in error replied, "That he sold out but can't sell all my dead beats," witness remarked that he referred to people that owed him. Defendant in error is further corroborated by the witness Cole who testified "We (referring to himself and the parties to the suit) went down there and the formality of turning over the store was gone through. This was between seven and eight o'clock. While at the store the young lady (referring to Miss Young) was told by Rosenfeld to change all the names of the account books. Rosenfeld explained the working of the register to Ehrhert, I think two or three keys were delivered to him (referring to Mr. Ehrhert) and also delivered a key to the front door of the store to Mr. Ehrhart. Mr. Ehrhart locked up the store. After he locked the store he gave the keys to Rosenfeld so that he could get in, in the morning to open up." Defendant in error is further corroborated by certain of the customers who testified that plaintiff in error had stated to them he had sold out. The testimony of defendant in error is further to the effect that he delivered a deed to the property which he was to give in exchange to plaintiff in error for said stock of goods, horses, wagons, etc., and that said deed was accepted by plaintiff in error. On the

other hand plaintiff in error contends that said trade was not to be closed until Judge Sandy, his attorney should have opportunity to examine the abstract and also to examine the premises which he was trading for, as to its valuation. He also contends that he did not deliver possession of said store to defendant in error; that whatever was done at the store concerning the operation of the same was merely tentative and that its final delivery should depend on the approval of the title to the property to be received by him from defendant in error in exchange for said stock of goods. Plaintiff in error also contends that at the time the contract in question was signed that he was considerably intoxicated and that he did not know at that time what he was signing. The evidence, however, discloses that the next day after the signing of said contract plaintiff in error assigned the insurance, attempted to assign the lease, procured the drafting of a bill of sale and otherwise took steps to carry out its provisions. The contention therefore of plaintiff in error that he was intoxicated at the time of signing said contract and did not understand the same, even if true, would not avail him, as these acts of his, looking toward the carrying out of said contract were voluntarily on his part. The evidence discloses that up until the day in which he refused to allow defendant in error in said store he was anxious to consummate said contract.

As to whether or not said stock of goods, fixtures, horses, etc., were in fact delivered to defendant in error,

as claimed by him, was a question of fact to be determined by the trial court, and as the evidence was conflicting on this controverted question, the finding of the court should not be disturbed unless against the manifest weight of the evidence. In our opinion the evidence in the case fully warranted the court in finding that said stock of goods was in fact delivered to defendant in error as contended by him. Where a jury has been waived, the finding of the trial judge is entitled to the same weight as the finding of a jury on the controverted questions of fact and unless said finding is against the manifest weight of the evidence, it should not be disturbed by this court. Walden v. Lewis, 71 Ill. 458; Podolski v. Stone, 186 Ill. 540; McLeand v. Feinberg, 145 App. 274; Lashins v. Lesley, 152 App. 141.

It is further contended by plaintiff in error that the fact that the bill of sale caused to be prepared by him for said stock of goods was not delivered is conclusive evidence that no delivery of said stock of goods, fixtures, etc. was made to defendant in error. This position is not well taken for the reason that a bill of sale is not necessary to pass the title to personal property, and if in fact the possession of the goods were delivered it would make no difference that said transaction was not evidenced by a bill of sale. Actual delivery of possession of personal property is usually of itself sufficient evidence of an intention to affect a sale thereof. Straus v. Winzesheimer 78 Ill. 492; Webster v. Granger, 78 Ill. 230; Graff v. Finch, 58 Ill. 373.

One of the assignments of error made by plaintiff in error is that the court erred in refusing to hold certain propositions of law presented by him to be held on the trial of said cause. This assignment of error was not argued in plaintiff in error's brief and under the rules of this court is thereby waived.

A further contention of plaintiff in error is that the court erred in its rulings on the evidence. The law is that even though the trial court may have admitted incompetent evidence on the hearing, yet if there be sufficient competent evidence in the record to sustain the court's finding and judgment, the judgment should not be disturbed on that account. Drum v. Drum, 251 Ill. 232; Radtke v. The People, 171 App. 462; Cassem v. Prindle, 250 Ill. 11.

The finding and judgment of the trial court being supported by the evidence and there being no reversible error in the record the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

not to be rejected in full.

The finding and judgment of the trial court being supported by the evidence and there being no prejudicial error in the record, judgment will be affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th day of November, A. D. 1916.

C. C. Johnson

Clerk of the Appellate Court.

NION

2358

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 619

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Perks & Higgins,

Appellants.

vs.

No. 10.

March Term, 1916.

L. F. Tippett, et al,

Appellees.

ERROR TO
APPEAL FROM

Circuit COURT

Alexander COUNTY

TRIAL JUDGE

HON. W. N. BUTLER.

Term No. 10. In the Appellate Court Agenda o.:
of Illinois, Fourth District.
March Term, 1915.

. C. Clerks and Thomas Higgins, partners, doing business as Clerks & Higgins, Appellants
vs.
O. F. Bennett, et al, Appellees.

Appeal from the Circuit Court of Alexander County.

Opinion by Boggs, J.

Appellants, a partnership doing business as Clerks & Higgins, on the 7th day of April, 1909, filed a bill in chancery in aid of an execution to enforce a judgment lien against certain real estate of appellees.

The record discloses that on the 6th day of October, 1904, appellants obtained a judgment in a Justice of the Peace Court against one O. F. Donovan and Amanda E. Dunning, for the sum of Two Hundred Dollars. On the 26th day of October, 1904, an execution was issued by the justice upon said judgment and was returned unsatisfied on the 17th day of December 1904. On the 26th day of December, 1904, appellants caused a transcript of the judgment, together with copies of the summons, and return of the officer thereon, the execution with return of the officer thereon, and a copy of the docket entries of said Justice of the Peace in said cause to be filed in the office of the Clerk

of the Circuit Court as provided by Statute. On the 18th day of November 1905, said judgment debtor, W. L. McCraven, who was the owner of the lands involved in this suit at the time the transcript was filed conveyed all his real estate to W. A. Lippett, appellee, in consideration.

Appellants filed their said bill alleging that said conveyance to appellee Lippett was made without consideration and in fraud of the rights of creditors, and asked to have said conveyance set aside in order that the judgment of appellants against the said McCraven might be levied upon said lands, and the same be sold in satisfaction thereof. Appellees filed their answer to said bill admitting the conveyance of the land described in the bill, but denying that said conveyance was without consideration and in fraud of the creditors of the said McCraven. On the contrary it was averred that said conveyance was made to appellee Lippett in good faith and that he paid the said McCraven in full therefor. Replication was filed to said answer and said cause was referred to the Master. The Master made report of his findings to the Court to the effect that said conveyance so made by McCraven to appellee Lippett was bona fide and for a valuable consideration, and that the same was not in fraud of the rights of creditors of McCraven and recommended a decree in favor of appellee. Thereafter at the same term leave was given to appellants to amend their said bill of complaint and the same was amended by adding the following averment thereto: "Your orators further represent unto your honor that upon the same day said transcript was filed, to-wit: the 28th day of December, A. D. 1904, an

execution was issued upon said transcript so filed as aforesaid, by the clerk of the Circuit Court of said County and State, and delivered by said Clerk to the Sheriff of said county and state for service upon the lands, tenements, goods and chattels of the said W. H. McHaven, and thereupon said judgment was and became a lien upon the lands of the said W. H. McHaven from thence, to-wit: December 28, A. D. 1904, hitherto." Said cause was re-ferred to said Master, the evidence was taken and thereafter said Master made report to the court that all the proceedings taken and had by appellants before said Justice of the peace in the case of appellants against said W. H. McHaven, et al, and the filing of the transcript above mentioned were regular and in conformity to law, but finding that appellants failed to have an execution issued upon the filing of the transcript and that appellants' judgment was not a lien at the time appellee Linnett purchased the premises from said W. H. McHaven, and reported as a conclusion of law that the equities of the cause was with appellee. Objections were filed to said report of said Master and were by him overruled. Upon a hearing before the chancelor the exceptions to the report of the master were overruled. The report was confirmed and a decree was entered dismissing appellants' bill for want of equity.

The evidence, we think, is beyond question to the effect that said conveyance was made in good faith and not made with the intention of defrauding the creditors of McHaven that theory of appellants' case was practically abandoned by them in their argument. The only real controverted question in the case is as to whether or not an execution was issued by the Circuit Clerk of Alexander County on the transcript of said judgment in favor of appellants as

claimed by them. If such execution was so issued and placed in the hands of the sheriff then the finding of the master and the chancellor was erroneous, but if no execution was issued as claimed by appellee, then said finding was correct and the decree of the court should be affirmed.

The evidence relied on by appellants to sustain their contention is confined to the testimony of appellant, . . Lerks, and of John Dewey, who was deputy Circuit Clerk at the time said transcript was filed. Appellant, Lerks, testified to the effect that he filed a transcript of the proceedings before said Justice in the office of said Circuit Clerk, and that at his request said deputy issued an execution thereon, and delivered the same to the sheriff of said County, and that he, appellant, accompanied said deputy to the office of said sheriff. John Dewey, the deputy clerk, testified that appellant, Lerks, brought said transcript into the office and that he filed it and that appellant requested him to issue execution thereon, and to the best of his recollection he issued said execution and delivered the same to the Sheriff of said County. On the other hand, James D. Roche, a witness, on behalf of appellee and who was Sheriff of said Alexander County at the time said transcript was filed in the office of the Circuit Clerk testified that no execution was delivered to him at any time by the Circuit Clerk of said County on the judgment held by appellants against Weaven. This witness further testified that he kept a record of all the legal papers delivered to him for service during his term

of office and that he knew from an examination of said records that he had received no such execution and further testified as a positive fact, that no execution of that character was delivered to him, or to anyone else for him during his term of office.

Appellee's contention is further corroborated by the execution docket kept by the Circuit Clerk of said County which said execution docket was offered in evidence and which wholly fails to show the issuance of any execution on the judgment or transcript, either on the date said transcript was filed or at any time. This docket being a docket required under the law to be kept we think it was competent evidence tending to show whether or not an execution was issued as claimed. (Chapter 26. Sec. 16, Hurd's Revised Statutes; Decker v. Quigg, 54 Ill. 390; Ellis v. Huff, 29 Ill. 449.)

The testimony of the witnesses in this case, it will be observed was given more than seven years since the date of the filing of said transcript and in as much as the Sheriff who testified that no execution was delivered to him on the judgment in question, either at the time claimed by appellants or at any other time, during the term of his office, is corroborated by the records kept by the Circuit Clerk, and by the records kept by him as sheriff, and in as much as no execution appears in the files of said cause, we are unable to say that the master in chancery to whom said cause was referred and said chancellor before whom said cause was tried, were not fully warranted in finding

the issues in favor of appellees.

Where the evidence is conflicting and the chancellor has confirmed the findings of the master this court will not disturb the decree unless it is clearly and manifestly against the weight of the evidence. Day v. Wright, 233 Ill. 218; Siegel v. Andrews & Co. 181 Ill. 356; Champion v. McCarthy, 228 Ill. 87; Baltimore v. Berry, 171 Ill. 219.

In the case of Siegel v. Andrews & Co. supra, at page 356, the court says: "The first contention raises a question of fact which has been passed upon adversely to appellants by the Master. This finding has been approved by the Chancellor, and, after a careful reading and consideration of the evidence, we cannot say that its weight is manifestly and clearly against the finding, and that being so, we should not and will not disturb it."

Finding no reversible error in this record, the decree of the Circuit Court will be affirmed.

Decree affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th *day of November, A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

NION

2357

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

202 I.A. 620

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

James W. Bluff,

Plaintiff in error

vs.

No. 14

March Term, 1916.

Peter Kohl,

Defendant in error

ERROR TO
APPEAL FROM

Circuit COURT

Hamilton COUNTY

TRIAL JUDGE

HON. CHARLES H. MILLER

Term No. 14. In the Appellate Court
of Illinois, Fourth District.
March Term, 1916.

James W. Bluff, Plaintiff in error)
) Writ of Error to the
vs.) Circuit Court of Hamilton
) County.
Peter Rohl, Defendant in error)

Opinion by Boggs, J.

This appeal is prosecuted from a judgment of the Circuit Court of Hamilton County dismissing an appeal taken by plaintiff in error from a judgment rendered against him in favor of defendant in error before a Justice of the Peace of said County.

Defendant in error recovered a judgment against plaintiff in error before a Justice of the Peace of Hamilton County, from which judgment plaintiff in error prosecuted an appeal to the Circuit Court of said County. At the September term 1915 of said Court judgment was entered dismissing said appeal for want of prosecution. A writ of procedendo was awarded, and judgment was entered against plaintiff in error for the costs of said appeal, from said judgment this appeal is prosecuted.

No abstract of record has been filed in this court. The transcript of the record filed in this court contains no bill of exceptions and the only order that is properly shown by said transcript is the judgment of the Court dismissing for want of prosecution the appeal taken by plaintiff in error, and ordering the writ of procendo with judg-

ment for costs against plaintiff in error.

The errors assigned on the record are that the court erred in not allowing the defendant's motion for a continuance; that the court erred in dismissing the appeal for want of prosecution by the defendant; that the court erred in awarding a procedendo without hearing evidence of the plaintiff's demand, and that the court erred in adjudging and ordering the defendant to pay the costs of said appeal.

As to the first error assigned it is only necessary for us to say that as there is no bill of exceptions contained in the record showing said motion for a continuance and the affidavit in support thereof, this court is therefore powerless to consider the same. Starnes v. Herrin Coal Co. 147 Ill.App.75; Bennett v. Nicholson, 167 Ill. 536; Fuller v. Lederer, 115 Ill.App. 269; Chesters v. Madison Coal Corporation, 190 Ill.App.441; I.C.R.R. Co. v. Hendrian, 19 Ill. 561.

With reference to the second error assigned it is argued by the plaintiff in error that the trial court erred in dismissing the appeal taken by plaintiff in error instead of requiring the defendant in error to make proof of his case. We have examined the authorities cited by plaintiff in error in support of his contention, but the cases cited by him do not bear out the same.

In the case of Boyd v. Locher, 21 Ill. 295, cited by plaintiff in error the court at page 298 says: "In cases brought to the Circuit Court under section sixty, (the section providing for appeals from the judgment of a Justice

of the Peace) the parties must follow up their appeal, in the same manner as in appeals from the Circuit Court to the Supreme Court. The plaintiff in error not having so done, his appeal was properly dismissed.' This case was cited and approved in Allen v. City of Monmouth, 77 Ill. App.380.

In the case of Morgan v. Campbell, 54 Ill.App.243, an order had been issued by the Circuit Court on an appeal from a Justice of the Peace as follows: "This cause this day being called for trial and the appellant failing to prosecute his appeal in this behalf, it is ordered that said cause be, and the same is hereby dismissed at appellant's cost for want of prosecution." At page 244 the court says: "This order was irregular, for if appellant there, Campbell, was in default, not the cause, but the appeal should have been dismissed with the procedendo to the justice."

It is strenuously insisted by plaintiff in error that the case of Langenheim v. Stickney, 85 Ill.301, supports his contention that the trial court had no authority to dismiss the appeal but should have proceeded to hear the cause. In that case the defendant was in court and was prosecuting his appeal, though not ready for trial as was shown by his bill of exceptions. In this case however no bill of exceptions appears in the record, and as stated above, the only order that the record shows is the order of the court dismissing the appeal for want of prosecution, which under the authorities above cited was the correct order to make. In the case of Lawler v. Gordon, 91 Ill. 6[illegible], being a case

cited by plaintiff in error, the court says at page 6 4:
"Appellant bound himself to prosecute his appeal with effect. The mere execution and filing of an appeal bond does not discharge that obligation. It imposes the duty of being present, ready for trial when the cause is called regularly for trial, and not only so, but to change the result of the trial in the court below. Here, the case was regularly called for trial; plaintiff in error was not present, and failed to be present to prosecute his appeal by defending his suit. Had he been present when the appeal was dismissed it might have been otherwise. Baughman v. Stickney, 90 Ill. 361."

The case of Lawler v. Gordon, supra, we think, is decisive of the question presented by this record, and is against the contention made by appellant.

There are several affidavits filed with the transcript of the record inthis case but they are no part of it. An affidavit is made by the attorney for plaintiff in error to the effect he made a motion for continuance during the trial of the cause in the court below, but this motion for a continuance and affidavit as claimed to have been filed in the trial court do not appear by bill of exceptions in the record.

We would have been warranted in affirming this case without going into a consideration of the contentions made by plaintiff in error that the trial court had no right to dismiss the appeal, as there was no abstract of the record filed in this court.

Finding no error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 20th *day of November, A. D. 1916.*

Clerk of the Appellate Court.

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2362

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

202 I.A. 641

James Monk,

Appellant

vs.

No. 29

March Term, 1916.

Caseyville Railway Company,

Appellee

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 29. In The Appellate Court Gross No.9

of Illinois, Fourth District.

March Ter , A. D. 1916.

James Monk, Appellant)
)
vs.)
) Appeal from the Circuit Court
Caseyville Railway Company,) of St. Clair County.
Appellee.)

Opinion by Boggs, J.

An action on the case was instituted by appellant against appellee in the Circuit Court of St. Clair County, Illinois, to recover damages alleged to have been caused by reason of an embankment constructed and maintained across the lands of appellant without having sufficient openings through said embankment to allow the water coming upon his said lands to properly drain off.

A trial was had resulting in a verdict and judgment in favor of appellee from which judgment this appeal is prosecuted.

Appellant contends for a reversal of this case, first, that the verdict of the jury was against the manifest weight of the evidence, and second, that the court erred in instructing the jury on behalf of appellee.

The evidence discloses that ~~Monk~~ Plaintiff owned thirty-seven acres of land lying in the Eastern addition to St.Clair

County, and it ~~is~~ was through this tract of land that ~~appellee~~ defendant constructed its railroad and built the embankment complained of by ~~appellant~~ plaintiff. ~~The evidence further discloses that~~ This land frequently overflows, ~~and in fact,~~ ~~appellant~~ plaintiff himself testified, "There is a lake or natural stream that flows through my land. It flows from Lansdowne through my land into the big lake. This embankment of the defendant railway company is built across that lake and they did not leave opening enough. They only put in a 36 inch pipe and a 36 inch pipe will not drain a lake 200 feet wide and 8 or 9 feet deep." This testimony of appellant gives a pretty good idea of the situation in regard to this land and its condition with reference to being covered with water. It is appellant's contention that the construction of the embankment for the railroad company caused the water to back on his land, for the alleged reason, as he claims, that this 36 inch pipe was not sufficient in size to allow the water to escape from his land, but caused it to back on the same, thereby injuring and damaging his crops. On the other hand appellee contends that there was practically no fall to the water at this point and that at times the water on one side of the embankment would be a little higher than on the other and vice versa; that there would be times when the water would flow through this 36 inch tile from the north to the south and at other times it would flow from the south to the north, depending on local conditions. The particular rainfall that appellant claims was responsible for the damages caused his crops occurred in June 1915. The line of

defendant's plaintiff's
appellee's railroad cut appellant's tract of land into two parts, one part lying on the north side of the track and the other on the south. The contention of plaintiff appellant was that his crops were damaged on account of the water overflowing his land and that this condition obtained on both sides of the embankment.

Appellant's testimony with reference to the overflowing of his land in June 1915 was to the effect that "there was four feet of water on the north side of the embankment and only two or three on the south side." The engineer who testified on behalf of appellant testified that at the time his survey was made the water was higher on the north side of the embankment than it was on the south side. "I would say not more than three or four inches and there was quite a current through the pipe." The evidence, we think, discloses the fact that the land owned by plaintiff appellant through which appellee's railroad was constructed was practically flat and that the land had very little fall. In our opinion the jury were warranted in finding that this embankment did not cause the water to back on appellant's land so as to cause damage to his crops, but that the overflow of appellant's lands was on account of natural conditions. The evidence is to the effect that in the times of heavy rain fall appellant's lands and that of others in that locality were covered by water practically like a lake.

Appellant's next contention is that the court erred in giving the second, third, fifth and sixth instructions given on behalf of appellee. The second instruction was with

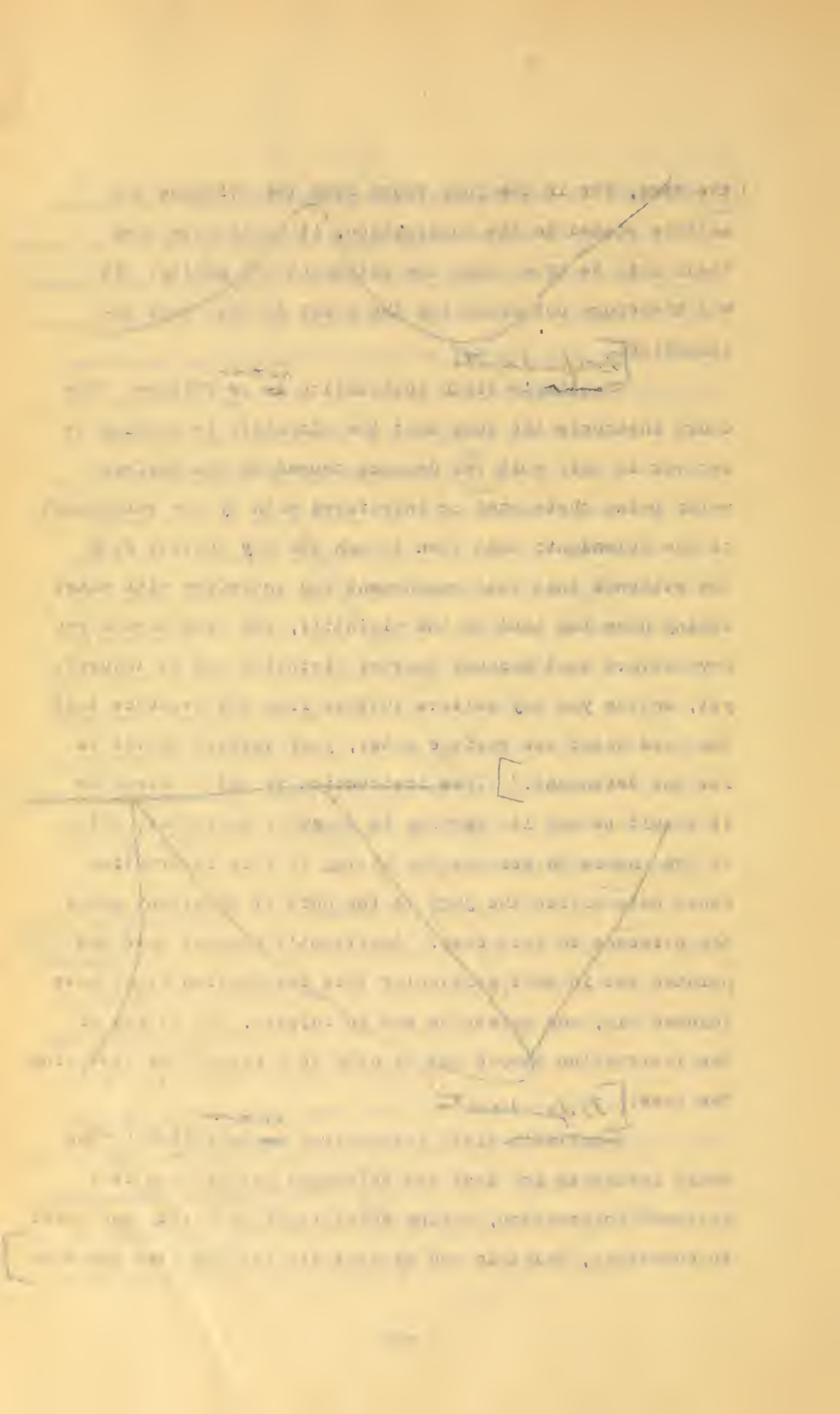
reference to the credibility of witnesses and the weight to be given to their testimony. This instruction concluded by instructing the jury that if it appeared that any witness had knowingly or wilfully testified falsely to any material fact, the jury had the right to disregard the testimony of such witness, except in so far as it was corroborated by other credible testimony or by facts and circumstances proven on the trial. It is insisted by appellant that it was erroneous to instruct the jury that if it appears that any witness has wilfully testified falsely. We think this criticism is not well taken and that the effect of this instruction is to state to the jury that if they believe from the evidence that any witness has wilfully testified falsely to any material fact that then they may discredit his testimony, except in so far as corroborated by other credible testimony, or by the facts and circumstances appearing on the trial. There was no error, we think, in the giving of this instruction.

The third instruction was to the effect that if the jury believe from the evidence that the lands of plaintiff had prior to the construction of the embankment by the defendant been subject to overflow, and if they believed the crops of appellant to have been injured and destroyed in the same manner and to as great an extent before as after the embankment had been constructed by defendant, they should find the defendant not guilty. We do not entirely approve of the form of this instruction and yet we are unable to see how the appellant could have been injured by the giving of

the case, for if the jury found from the evidence the matters stated in the instruction, it would have been their duty to have found the defendant not guilty. It was therefore not error for the court to give this instruction.

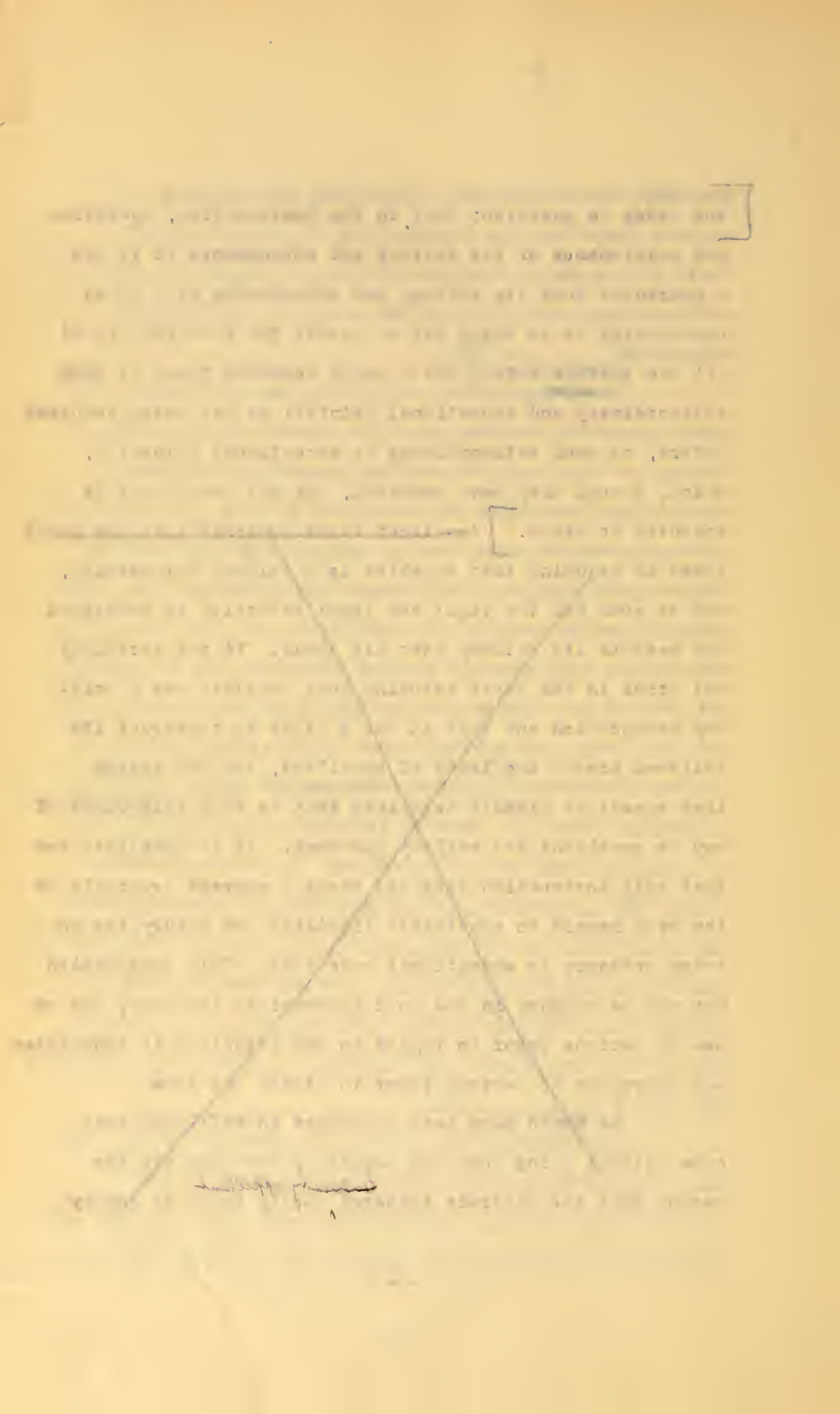
Defendant's ~~Appellee's~~ fifth instruction was as follows: "The court instructs the jury that the plaintiff is seeking to recover in this suit for damages caused by the surface water being obstructed or interfered with by the embankment of the defendant; that even though you may believe from the evidence that said embankment did interfere with water coming upon the land of the plaintiff, and even though you may believe that because thereof plaintiff was so injured, yet, unless you may believe further from the evidence that the said water was surface water, your verdict should be for the defendant." ~~This instruction is not as clear as~~ it should be and its meaning is somewhat ambiguous, still we are unable to see how the giving of this instruction could have misled the jury to the hurt of appellant under the evidence in this case. Appellant's counsel have not pointed out in what particular this instruction could have injured him, and unless he was so injured, the giving of the instruction should not be held as a ground for reversing the case.

Defendant's ~~Appellee's~~ sixth instruction was as follows: "The court instructs you that the defendant corporation is a railroad corporation, acting under legal authority and power to construct, maintain and operate its railway over and upon



the lands in question; that in the construction, operation and maintenance of its railway and embankments it is not a guarantor that its railway and embankments will be so constructed as to carry off or permit the carrying off of all the surface waters which might occur at times of such extraordinary and exceptional rainfall as has never occurred before, or such extraordinary or exceptional rainfalls, which, though they have occurred, may not reasonably be expected to occur. Appellant first contends that the court erred in assuming that appellee is a railway corporation, and as such has the right and legal authority to construct and operate its railway over its lands. It was certainly not error in the court assuming that appellee was a railway corporation and that it had a right to construct its railroad across the lands of appellant, for the reason that appellant himself testified that he sold said right of way to appellant for railway purposes. It is next insisted that said instruction does not state a correct principle of law with regard to appellee's liability for injury for an extraordinary or exceptional rainfall. This instruction may not be couched in the most appropriate language, but we see no serious error in regard to the principle it enunciates and there was no serious error in giving the same.

We would have been warranted in affirming this case without going into the merits of the same for the reason that the abstract tendered by appellant wholly fails to comply



with the rules laid down by this court covering the preparation of the same. Appellant wholly fails to abstract the pleadings; no reference whatever is made to the same, and the index to the abstract relates alone to the record, and does not pretend to index the abstract so that the court desiring to examine the testimony of any particular witness must either search through the abstract to find the same or must go to the record. Counsel in preparing an abstract should be careful to follow the rules of court as it causes great inconvenience when this is not done, and warrants an affirmance of a judgment under the rules without a consideration of the case on its merits. Staude v. Schumacher, 167 Ill. 167; Dickon v. City of Springfield, 240 Ill. 7.

There were other errors assigned on the record but were not argued in the brief and under the rules of this court they are taken as waived.

Believing there is in this record no serious error, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd *day of November, A. D. 1916.*

Clerk of the Appellate Court.

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